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No. 10708

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

Vol  
2387

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R. J. REYNOLDS TOBACCO COMPANY and  
L. R. DONNELLY,

Appellant,

vs.

GEORGE H. NEWBY, in his own behalf, RICH-  
ARD ARLEN NEWBY and PATTY ANN  
NEWBY, both minors, by their Guardian ad  
Litem, George H. Newby,

Appellees.

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Transcript of Record

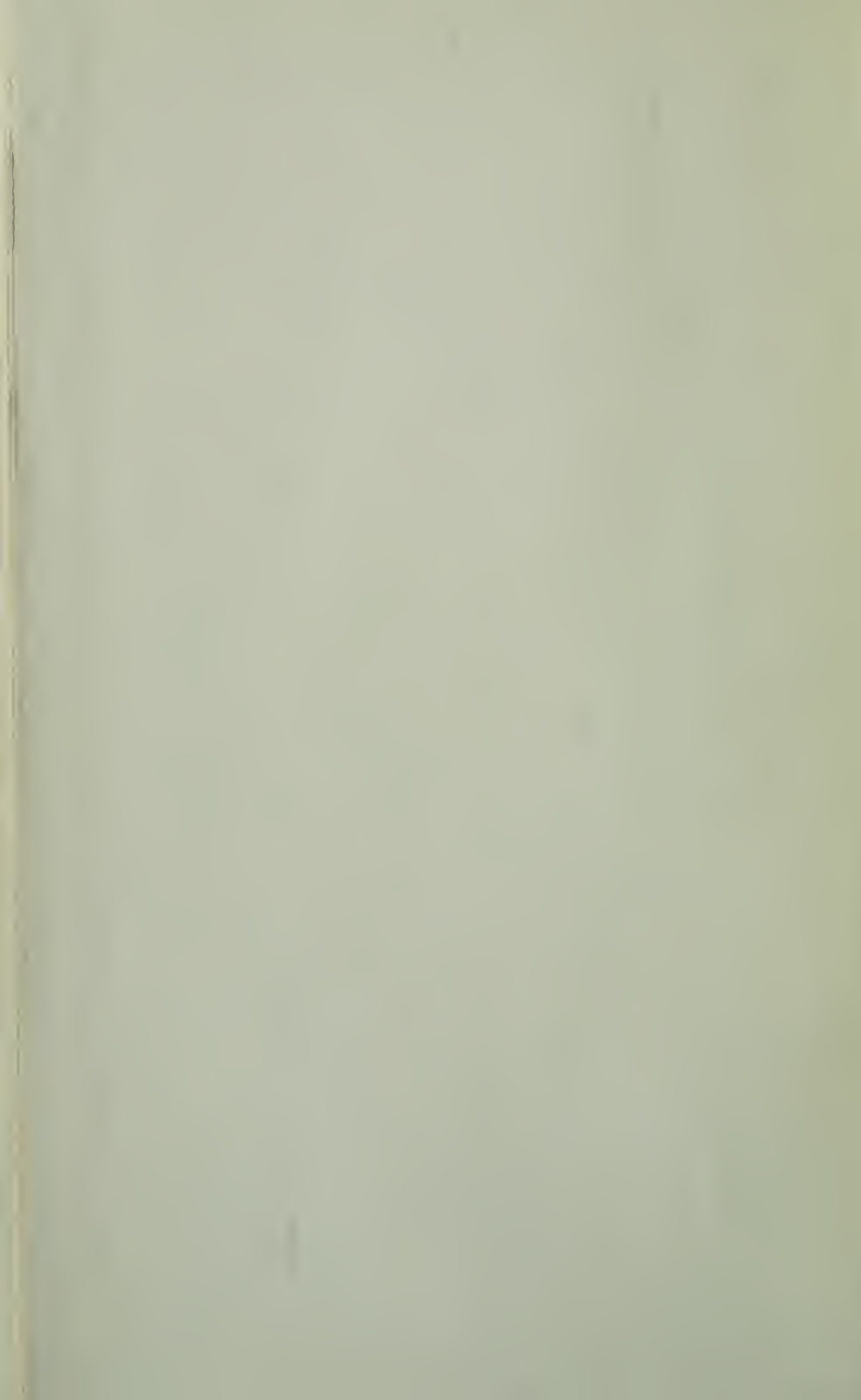
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Upon Appeal from the District Court of the United States  
for the District of Idaho  
Eastern Division

FILED

MAY 11 1944

PAUL P. O'BRIEN,  
CLERK



B. W. DAVIS

Attorney at Law  
Ross-Davis Bldg.  
Pocstello, Idaho.

September-22, 1944.

Mr. Paul P. O'Brian, Clerk,  
U. S. Circuit Court of Appeals,  
San Francisco, 1, California.

Re: No. 10708 - Reynolds Tobacco Co. et al  
vs. George Newby, et al.

Dear Mr. O'Brien:

In talking to Mr. Merrill since he returned from Portland, I was a little concerned about the impression that may have been left with the court about the reason for my not appearing. I may be unduly apprehensive about this, but it will do no harm for me to write you about it.

I was of the impression that I had indicated in our correspondence that the matter would probably be submitted without argument by the Appellees and because of the fact that I could not hear from Mr. Newby who is somewhere in the South Pacific, and that I had no authority to go to the expense of the trip without Newby's authorization and that it would probably be impossible for Mr. Coughlan to be present, because of his being in the service.

In my discussion of the matter with Mr. Merrill, I did not intend to make any statements to him or to place any burden upon him to make any explanation to the court.

I felt I was in position where so far as I was concerned, the matter had to be submitted without argument if I did not hear from Mr. Newby before the time of the argument.

Probably this matter does not need to be called to the attention of the court at this time. If it does, I am sure you will know and if it does need any further explanation I would appreciate having you call this letter to their attention. Otherwise, just ignore it.

Thanking you for the kindness you have shown me in this matter, I am

Yours very truly,

B. W. DAVIS.



The first thing I noticed when I stepped out of the car was the cold. It was a sharp contrast to the warm blanket I had been sitting under. I looked up at the sky, which was a deep, dark blue, and felt a sense of peace. The air was crisp and clean, and I could hear the distant sounds of the city. I took a deep breath and felt a sense of relief. I had been waiting for this moment for so long, and now it was here. I felt a sense of accomplishment and a sense of freedom. I was finally on my own, and I was going to make the most of it. I was going to live my life to the fullest, and I was going to do it my way. I was going to be happy, and I was going to be free. I was going to be me.

Montecarlo, Igopo.  
 Bona-Delara B198.  
 Vicoletto, 17 Jan

No. 10708

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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R. J. REYNOLDS TOBACCO COMPANY and  
L. R. DONNELLY,

Appellant,

vs.

GEORGE H. NEWBY, in his own behalf, RICH-  
ARD ARLEN NEWBY and PATTY ANN  
NEWBY, both minors, by their Guardian ad  
Litem, George H. Newby,

Appellees.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the District of Idaho  
Eastern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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OF RECORD

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Attorneys for Appellees.

ROY L. BLACK,

JOHN R. BLACK,

Pocatello, Idaho,

Attorneys for Rulon D. Hair, Defendant,  
who is not an Appellant. [\*2]

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the Fifth Judicial District  
of the State of Idaho, in and for the County of  
Bear Lake

Transcript on Removal

No. 1196

GEORGE H. NEWBY, in his own behalf; RICH-  
ARD ARLEN NEWBY, and PATTY ANN  
NEWBY, both minors, by their Guardian Ad  
Litem, GEORGE H. NEWBY,

Plaintiffs,

vs.

R. J. REYNOLDS TOBACCO COMPANY, L. R.  
DONNELLY and RULON D. HAIR,

Defendants.

### COMPLAINT

Comes now the plaintiffs and for a cause of action  
against the defendants, complain and allege:

#### I.

That George H. Newby is a widower, the sur-  
viving husband of Avenell Newby, and the father  
of Richard Arlen Newby and Patty Ann Newby,  
the children of Avenell Newby, deceased, and the  
plaintiff. That said Richard Arlen Newby is a  
minor of the age of approximately eight years, and  
Patty Ann Newby is a minor of the age of ap-  
proximately six years and that George H. Newby  
was, on the 28th day of September, 1942, by order  
of the above entitled court, duly made and entered,  
duly and regularly appointed guardian ad litem  
for said Richard Arlen Newby and Patty Ann



Newby with authority to institute, maintain, and conclude this suit. That the said George H. Newby, Richard Arlen Newby and Patty Ann Newby, minors, are the sole and only heirs at law of the said Avenell Newby, deceased.

II.

That the R. J. Reynolds Tobacco Company, one of the defendants herein is a corporation organized and existing under and by virtue of the laws of the State of North Carolina and doing business in the State of Idaho, as a foreign corporation. [3]

III.

That at all times hereinafter mentioned the defendant L. R. Donnelly was a citizen and resident of the State of Utah with his place of business and residence in Salt Lake City, State of Utah.

IV.

That at all times hereinafter mentioned the defendant, Rulon D. Hair was a citizen and resident of the State of Idaho with his residence and place of business in the City of Pocatello, Bannock County, Idaho.

V.

That the defendant, Rulon D. Hair, at all times hereinafter mentioned was the duly authorized, agent, servant, and employee of the defendant, R. J. Reynolds Tobacco Company and Defendant, L. R. Donnelly, and was at all times hereinafter mentioned engaged in the course, scope, and line of his business for the above mentioned defendants,

R. J. Reynolds Tobacco Company and L. R. Donnelly.

#### VI.

That at all times hereinafter mentioned the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, furnished the defendant Rulon D. Hair, a Chevrolet Panel Truck, bearing State of Idaho, truck license 3A-150 and was used by said Hair in the prosecution of the business of said defendants tobacco company and Donnelly in the line, course, and scope of the employment of said Hair as an employee of said defendant Donnelly and said tobacco company.

#### VII.

That on the 11th day of September, 1942, at about 4:30 P. M., the deceased, Avenell Newby, was riding as a guest of the defendants in the above described Chevrolet Panel Truck, which at said time and place was being driven and operated by the defendant Rulon D. Hair, while acting within the line, course and scope of his employment as agent, servant or employee of the defendant Donnelly and defendant tobacco company, in a southerly direction on U. S. Highway 30 North at a point about 17 miles North of Montpelier, Idaho; that the said defendant Hair at said time and place negligently, carelessly, and recklessly and in complete disregard of the rights of others and particularly of the deceased, Avenell Newby, drove said automobile on said highway at an excessive, unreasonable, and dangerous [4] rate of speed, to-wit: 65 miles per

hour, while being warned by the deceased not to drive so fast, and then and there swerved back and forth across the road several times and ran off the East side of the road and tipped over, and inflicted divers and serious injuries upon plaintiffs deceased wife, Avenell Newby, from which she died on the 16th day of September, 1942.

### VIII.

That by reason of the injuries received by the said deceased, Avenell Newby, at the time and place above mentioned, she was cut, mangled, torn, bruised, lacerated and injured internally to such an extent that as a direct result thereof she died on September 16th, 1942 about five days after said accident.

### IX.

That at said time and place the defendant Rulon D. Hair was negligent, careless, and heedless directly, and the defendants Donnelly and Tobacco Company were negligent, careless, and heedless through and by said Hair, as their agent, servant, or employee while acting within the line, course and scope of his employment, in the following particulars:

In driving said truck along said highway at an unreasonable, excessive, dangerous, and unlawful rate of speed, to-wit: 65 miles per hour, in violation of the law of the State of Idaho. In not heeding deceased's warning to not drive so fast; in swerving back and forth across the highway several times; in running off the highway; in not

having said truck under such control as to be able to stop and avoid running off the highway and mortally injuring the plaintiff's deceased wife, Avenell Newby.

### X.

That one, more, or all of the aforesaid acts of negligence proximately caused the accident and injuries from which plaintiff's wife, Avenell Newby, died.

### XI.

That at the time of the above mentioned accident there was in full force and effect in the State of Idaho a statute, 48-504 (8) of the Idaho Code Annotated, (1932) which provides a speed limit of 35 miles per hour on highways and makes it unlawful to exceed this speed limit. [5]

### XII.

That the said Avenell Newby was of the age of 28 years; a strong, healthy woman, capable of making a home and doing the housework for the plaintiff George Newby and their minor children, Richard Arlen Newby and Patty Ann Newby, had she lived. That she was a kind and friendly person and was devoted to her family. That the minor children were dependent upon her for their care and guidance. That by reason of her death her husband, George H. Newby, has lost the love, comfort, and companionship of a devoted wife. That the minor children, Richard Arlen Newby and Patty Ann Newby, have lost the love, comfort, and care and

companionship that only their mother could give to the damage of the said George H. Newby and Richard Arlen Newby and Patty Ann Newby in the sum of \$100,000.00. That by reason of the injuries resulting in the death of the deceased, Avenell Newby, expenses were incurred for medical services in the amount of \$115.00 and for funeral and burial services in the amount of \$268.20.

Wherefore, the plaintiff, George H. Newby on *her* own behalf and as guardian ad litem for Richard Arlen Newby and Patty Ann Newby, prays for damages against the defendants and each of them for the amount of One Hundred Thousand Dollars general damages, and \$115.00 for medical services and \$268.20 funeral and burial expenses; for their costs of suit herein expended and for such other and further relief as may be found just and equitable in the premises.

GLENN A. COUGHLAN,

Attorney for Plaintiffs.

Residence and Post Office Address: Montpelier, Idaho.

(Duly Verified.) [6]

[Endorsed]: Filed September 29, 1942. [7]



[Title of Court and Cause in State Court.]

PETITION FOR AN ORDER APPOINTING  
GUARDIAN AD LITEM OF RICHARD  
ARLEN NEWBY AND PATTY ANN  
NEWBY, BOTH MINORS.

Your petitioner respectfully represents:

I.

That Richard Arlen Newby is a minor of the age of approximately eight years, and that Patty Ann Newby is a minor of approximately six years, children of George H. Newby, petitioner herein.

II.

That in the 16th day of September, 1942, Avenell Newby, the mother of Richard Arlen Newby and Patty Ann Newby was killed while riding as a guest of Rulon D. Hair, while he was in the line, course, and scope of his employment for L. R. Donnelly and the R. J. Reynolds Tobacco Company, in an automobile operated and driven by the said Rulon D. Hair.

III.

That your petitioner believes and therefore alleges that said Richard Arlen Newby and Patty Ann Newby have a good cause of action against the R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair.

Wherefore, your petitioner prays that the court enter an order appointing your petitioner as guardian ad litem of the said Richard Arlen Newby and

Patty Ann Newby for the purpose of instituting and maintaining a suit for damages against the said Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair.

GEORGE H. NEWBY,  
Petitioner.

(Duly verified.) [8]

[Endorsed]: Filed Sept. 29, 1942. [9]

---

[Title of Court and Cause in State Court.]

#### ORDER APPOINTING GUARDIAN AD LITEM

Upon reading and filing the petition of George H. Newby filed herein, wherein it is prayed that George H. Newby be appointed guardian ad litem for Richard Arlen Newby and Patty Ann Newby, minors; and it appearing to the undersigned Judge of the above entitled Court that George H. Newby is a competent and responsible person, and that it is expedient that he be appointed to represent said minors for the purpose of instituting, maintaining and concluding a suit against R. J. Reynolds Tobacco Company, a corporation, L. R. Donnelly and Rulon D. Hair, as outlined in said petition;

Now, Therefore, It Is Ordered that the said George H. Newby be and he is hereby appointed guardian ad litem for the said Richard Arlen Newby and Patty Ann Newby, and it is further ordered that said George H. Newby as such guardian ad litem be and he is hereby authorized and

directed to institute, prosecute and conclude said action referred to in said petition on behalf of said Richard Arlen Newby and Patty Ann Newby, minors.

Dated this 28th day of September, 1942.

ISAAC MC DOUGALL,

District Judge.

[Endorsed]: Filed Sept. 28, 1942. [10]

---

[Title of Court and Cause in State Court.]

### ORDER FOR REMOVAL

This cause coming on regularly for hearing upon petition and bond of the defendants R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair, herein, for an order transferring this cause to the United States District Court for the District of Idaho, Eastern Division; and

It Appearing to the Court that said defendants R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair have filed their petition herein for such removal in due form of law, and that they have also filed their bond duly conditioned with good and sufficient surety, as provided by law, and that said defendants have given plaintiffs due and regular notice thereof; and that all of said papers were duly filed before the time for said defendants to appear had expired, and

It Further Appearing to the Court that this is a proper cause for removal to the United States Dis-



trict Court for the District of Idaho, Eastern Division;

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed, that said petition and bond be, and the same are hereby accepted and approved, and that the above entitled cause be, and the same is hereby removed to the United States District Court for the District of Idaho, Eastern Division, and that all further [11] proceedings in this court be stayed and the clerk of the District Court of the Fifth Judicial District of the State of Idaho, in and for Bear Lake County, is hereby directed to make up the record in said cause and submit the same to the United States District Court for the District of Idaho, Eastern Division, on or before thirty days from the date of the filing of said petition.

Dated this 26th day of October, 1942.

ISAAC McDOUGALL

District Judge.

[Endorsed]: Filed Oct. 26, 1942. [12]

---

[Title of Court and Cause.]

**MOTION TO DISMISS AND TO MAKE MORE  
DEFINITE AND CERTAIN**

Come Now, The defendants, Reynolds Tobacco Company and L. R. Donnelly, and each of them, and move the court to dismiss the above entitled action upon the ground that the complaint fails to

state a claim upon which relief can be granted against them, or either of them.

Said defendants, and each of them, further move the court that if said motion to dismiss be not granted them, then and in that event the plaintiffs be required to make a more definite statement of the alleged negligence of the defendant, Rulon D. Hair; also the manner in which it will be contended said Rulon D. Hair recklessly drove said automobile upon the highway, and of what said alleged reckless conduct actually consisted, and what it will be contended he did, which constituted reckless disregard of the rights of the deceased.

Dated November 14, 1942.

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for defendants, R.

J. Reynolds Tobacco Company and L. R. Donnelly.

(Affidavit of Service Attached.)

[Endorsed]: Filed Nov. 14, 1942. [13]

[Title of Court and Cause.]

MOTION TO DISMISS AND MAKE MORE  
DEFINITE AND CERTAIN

Comes now the defendant Rulon D. Hair, and moves the Court to dismiss the above entitled action upon the grounds that the complaint fails to state a claim against this defendant upon which relief can be granted against him.

Said defendant further moves the court that if said Motion to Dismiss be not granted, then, and in that event, said defendant moves that the plaintiffs be required to make a more definite statement of the alleged negligence of the defendant and the manner in which it will be contended that the defendant Rulon D. Hair recklessly drove said automobile upon the highway and of what said reckless conduct actually consisted and that which it will be contended he did which constituted disregard of the rights of the deceased.

Dated this 14th day of November, 1942.

ROY L. BLACK &

JOHN R. BLACK

Attorneys for Defendant

Rulon D. Hair

Residing at: Pocatello, Idaho.

(Affidavit of Mailing Attached.)

[Endorsed]: Filed Nov. 16, 1942. [14]

[Title of Court and Cause.]

## MINUTES OF THE COURT

February 6, 1943

This cause came on for hearing on motions to dismiss and motion for a more definite statement in the complaint. Glenn A. Coughlin, Esquire, appeared for the plaintiffs and Messrs. E. B. Smith and A. L. Merrill, Esquires, appeared for the defendant Reynolds Tobacco Company and R. L. Donnelly. On agreement between counsel for the plaintiff and attorneys for the defendant Rulon D. Hair, the motions of defendant Hair were submitted to the Court upon the argument presented by counsel for the other defendants.

After hearing argument of counsel, it was ordered that the motions to dismiss and to make more definite and certain by the defendants R. J. Reynolds Tobacco Co. and Rulon D. Hair, and each of them, is denied. Exceptions were allowed to each of the defendants and twenty-five days were granted for filing of answer to complaint. [15]

---

[Title of Court and Cause.]

## ORDER ON MOTIONS

The motions of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly and of the defendant Rulon D. Hair to dismiss and to make more definite and certain were argued before the Court the 6th day of February, 1943 at Boise,

Idaho, pursuant to agreement of counsel for the respective parties to this cause. Mr. Glenn A. Coughlan appeared for the plaintiff and Messrs. E. B. Smith and A. L. Merrill appeared for the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly. Pursuant to agreement between the attorney for the plaintiffs and the attorneys for the defendant Rulon D. Hair, the motions of Rulon D. Hair were submitted to the Court upon argument of counsel for the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly.

After hearing argument of the respective counsel on the motions, and the Court having duly considered the same and being fully advised in the premises;

It Is Hereby Ordered And This Does Order, That the motions to dismiss and to make more definite and certain of the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly and of the defendant Rulon D. Hair are, and each of them hereby is, denied. [16]

Exceptions to the ruling of the Court are hereby granted to each and all of the defendants. Upon stipulation of counsel for the respective parties in open court it is hereby further ordered that the defendants and each of them be, and they are hereby granted twenty-five days from date hereof within which to prepare, serve and file their respective answers in this cause.

Dated this 6th day of February, 1943.

LLOYD L. BLACK,

United States District Judge.

Presented by Glenn A. Coughlan, Counsel for plaintiffs.

GLENN A. COUGHLAN,

Attorney for Plaintiffs.

O.K. as to form

A. L. MERRILL

E. B. SMITH

[Endorsed]: Filed Feb. 6, 1943. [17]

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[Title of Court and Cause.]

DEMAND FOR JURY TRIAL

To R. J. Reynolds Tobacco Company, R. J. Donnelly, and Rulon D. Hair, and Their Attorneys, E. B. Smith, A. L. Merrill of Merrill & Merrill and Roy L. Black of Black & Black:

Demand is hereby made by the plaintiffs in the above entitled cause for jury trial in the above entitled cause. Dated February 15, 1943.

GLENN A. COUGHLAN,

Attorney for Plaintiff

Montpelier, Idaho.

[Endorsed]: Filed Feb. 25, 1943. [18]



[Title of Court and Cause.]

ANSWER OF R. J. REYNOLDS TOBACCO  
COMPANY AND L. R. DONNELLY

Come now R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the defendants in the above entitled cause, and for answer to the complaint of plaintiffs on file herein admit, deny and allege as follows:

FIRST DEFENSE

The complaint fails to state a claim against these answering defendants, or either of them, upon which relief can be granted.

SECOND DEFENSE

I.

These defendants deny each and every allegation of said complaint not hereinafter specifically admitted.

II.

Answering paragraph numbere I of said complaint these defendants admit the allegations contained therein, save and except the allegation with reference to the order appointing guardian ad litem, and in this respect allege said order was made and entered by the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bear Lake. [19]

III.

These defendants admit the allegations contained in paragraphs Numbered II and III of said complaint.

## IV.

These defendants deny the allegations of paragraph numbered IV of said complaint. Defendants allege, however, that at the time of filing of said complaint the said Rulon D. Hair was and now is a citizen and resident of the State of Utah.

## V.

These defendants deny the allegations contained in paragraph numbered V of said complaint. Further answering said paragraph defendants allege that the said Rulon D. Hair had been acting as a salesman for the R. J. Reynolds Tobacco Company but was not so acting at the time nor with reference to any of the matters or things alleged in said complaint and none of said alleged acts were committed within the course, scope or line of any business or employment for the R. J. Reynolds Tobacco Company or L. R. Donnelly; that at the time of the alleged accident the said Hair was on a trip of his own and not for these defendants and was otherwise violating instructions of these defendants as hereinafter more fully set forth.

## VI.

These defendants deny the allegations contained in paragraph numbered VI of said complaint. Further answering said paragraph, however, defendants alleged that the Chevrolet Panel Truck therein described was the property of R. J. Reynolds Tobacco Company and was for the use of said Rulon D. Hair when engaged in the business of said company and not otherwise.



## VIII.

These defendants deny the allegations contained in paragraph numbered VII of said complaint. Further answering said paragraph these defendants allege that they have been [20] informed that at the time and place mentioned in said complaint Avenell Newby was riding in said Chevrolet Panel Truck as a gratuitous guest of Rulon D. Hair, but positively deny that she was a guest of either of these defendants. Defendants further allege that Rulon D. Hair was at said time under positive instructions from the R. J. Reynolds Tobacco Company and L. R. Donnelly not to accept for transportation in said automobile at any time any guest nor permit any person, other than a bona fide agent of the company to ride with him in said automobile and if he accepted Avenell Newby as a guest such was contrary to instructions theretofore given him, and was outside the scope of his employment and her presence in said car was without the knowledge or consent of these defendants and for the consequences of which neither of these defendants are liable under any circumstances.

## VIII.

Answering paragraph numbered VIII of said complaint, these defendants admit that Avenell Newby was injured and that she died September 16, 1942, but deny the remaining allegations of said paragraph.

## IX.

These defendants deny the allegations contained in paragraph numbered IX of said complaint.

## X.

These defendants deny the allegations contained in paragraph numbered X of said complaint.

## XI.

Answering paragraph numbered XI of said complaint, these defendants admit the existence of Section 48-504 (8) Idaho Code Annotated, 1932, but deny the materiality of said allegation and further deny the legal effect and conclusions drawn therefrom by the plaintiffs, and deny the remaining [21] allegations of said paragraph.

## XII.

These defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph numbered XII of said complaint, and upon this ground denies said allegations and all of them, except defendants admit that Avenell Newby was of the age of twenty-eight years or thereabouts. These defendants positively deny that said plaintiffs or any of them have suffered any loss or damage of any kind or character by reason of any act or thing by them suffered or permitted.

## THIRD DEFENSE

Further answering said complaint and as an additional defense thereto these defendants allege that

any injuries which the said Avenell Newby may have received in the accident described in the complaint and the damages to the plaintiffs, if any, resulting therefrom were proximately caused or contributed to by the negligence and carelessness of the said Avenell Newby, who was then and there guilty of contributory negligence and said injuries were not the result of negligence or want of care on the part of any of the defendants named in said complaint.

#### FOURTH DEFENSE

Further answering said complaint and as a further affirmative defense thereto these defendants upon their information and belief allege that at the time and place mentioned in said complaint the said Avenell Newby was, and for some hours prior thereto, had been riding in said automobile as a gratuitous guest of Rulon D. Hair, but not of these defendants, and all matters and things touching said trip and the operation of said automobile by Rulon D. Hair were fully known to her, and, having such information, she continued to [22] ride in said automobile and acquiesced in each and every thing done with respect thereto, and the driving of said automobile, and with such knowledge and acquiescence she thereby assumed all risk attendant thereon and by reason whereof no recovery can be had for damages, if any, which may have resulted from the accident alleged in the complaint.

## FIFTH DEFENSE

Further answering said complaint and as a further defense thereto defendants allege that the injuries which Avenell Newby may have sustained and the damages, if any, suffered by the plaintiffs, were the result of matters and things over which the driver of said automobile had no control and said accident occurred without fault on his part.

Wherefore, having fully answered said complaint, these defendants pray that plaintiffs take nothing by reason thereof and that they recover their costs incurred herein.

E. B. SMITH

Residing at Boise, Idaho.

A. L. MERRILL,

Residing at Pocatello, Idaho.

R. D. MERRILL,

Residing at Pocatello, Idaho.

Attorneys for R. J. Reynolds  
Tobacco Company and L.  
R. Donnelly.

(Duly verified.) [23]

The defendants R. J. Reynolds Tobacco Company and L. R. Donnelly hereby demand a trial by jury.

E. B. SMITH

A. L. MERRILL

R. D. MERRILL

Attorneys for said Defendants

(Affidavit of Mailing attached)

[Endorsed]: Filed March 1, 1943. [24]

[Title of Court and Cause.]

ANSWER OF DEFENDANT  
RULON D. HAIR.

Comes now Rulon D. Hair, defendant in the above entitled cause and for answer to the complaint of the plaintiffs on file herein, admits, denies and alleges as follows:

FIRST DEFENSE

The complaint fails to state a claim against this answering defendant upon which relief can be granted.

SECOND DEFENSE

I.

Defendant denies each and every allegation of said complaint not specifically admitted herein.

II.

Answering paragraph I of said complaint this defendant admits the allegations contained therein, save and except the allegations with reference to the order appointing guardian ad litem, and in this report alleges said order was made and entered by the District Court of the Fifth Judicial District of the State of Idaho, in and for the County of Bear Lake.

III.

Defendant admits the allegations of paragraph II and III of said complaint.

IV.

Answering paragraph IV defendant denies the



allegations thereof; [25] defendant alleges that at the time of the filing of said complaint the defendant was and now is a citizen and resident of the State of Utah.

V.

Answering paragraph V this defendant admits that he had been acting as salesman for the R. J. Reynolds Tobacco Company and denies each and every other allegation of said paragraph.

VI.

Answering paragraph VI defendant admits that defendant R. J. Reynolds Tobacco Company furnished this defendant Rulon D. Hair a Chevrolet truck bearing State of Idaho truck license No. 3A-150 to be used by the defendant in the prosecution of his business for said Tobacco Company in the line, course and scope of his employment by said defendant, R. J. Reynolds Tobacco Company and denies each and every other allegation of said paragraph VI of said complaint.

VII.

Answering paragraph VII this defendant admits that on to-wit: The 11th day of September, 1942, at about 4:30 P. M. one Avenell Newby was riding with this defendant as a guest of this defendant in the said above described Chevrolet panel truck which at said time and place, was being driven and operated by this defendant and that said truck was being driven in a southerly direction on U. S. Highway 30N at a point about 17 miles north of Mont-

pelier, Idaho; and defendant denies each and every other allegation of said paragraph; further answering said paragraph defendant alleges that he was driving on said highway at a speed not exceeding 35 miles per hour.

VIII.

Answering the allegations of paragraph VIII the defendant alleges that the said Avenell Newby was riding in said truck with the defendant at her own request and instance as hereinbefore stated and without any invitation from this defendant, said Avenell having requested defendant to permit her to ride with him. [26]

IX.

Defendant denies each and every allegation contained in paragraph IX of said complaint.

X.

Defendant denies each and every allegation contained in paragraph X of said complaint.

XI.

Answering paragraph XI of said complaint defendant admits the existence of said Section 48-504 (8) Idaho Code Annotated, 1932, but denies the materiality of said allegations of said Statute and further denies the legal effect and conclusions drawn therefrom by plaintiffs.

XII.

Answering paragraph XII of the complaint defendant admits that said Avenell Newby was about the age of 28 years and denies each and every other

allegation of said paragraph; defendant specifically denies that said George H. Newby, Richard Arlen Newby and Patty Ann Newby have been damaged in any sum or amount by reason of any act or omission on the part of this defendant.

### THIRD DEFENSE

Further answering said complaint and as an additional defense thereto this defendant alleges that any injuries which the said Avenell Newby may have received in the accident described in the complaint and the damages to plaintiffs, if any, resulting therefrom, were proximately caused or contributed to by the negligence of the said Avenell Newby who was then and there guilty of contributory negligence and that said injuries were not the result of negligence or want of care on the part of this defendant or any of the defendants named in the complaint.

### FOURTH DEFENSE

Further answering the said complaint and as a further affirmative defense this defendant alleges: That at the time and place mentioned in said complaint the said Avenell Newby was and for some time prior thereto had been riding in said automobile as a gratuitous guest of this defendant and at [27] her own request, and that all matters and things touching the said truck and the operation of said automobile by this defendant were fully known to her and having such information she continued to ride in such automobile and acquiesce and join with



the defendant in each and every thing done with respect thereto, and the driving of said automobile, and with such knowledge and acquiescence she thereby assumed all risk attendant thereon and by reason whereby no recovery can be had for damages, if any, which may have resulted from the accident alleged in the complaint.

### FIFTH DEFENSE

Further answering said complaint and as a further defense thereto this defendant alleges that the injuries which Avenell Newby may have sustained and damages, if any, suffered by plaintiffs, were the result of matters and things over which this defendant had no control and said accident occurred without fault and without negligence on the part of this defendant.

Wherefore, having fully answered said complaint, this defendant prays that plaintiffs take nothing by reason thereof and that this defendant recover his costs incurred herein.

ROY L. BLACK

JOHN R. BLACK

Attorneys for Defendant,

Rulon D. Hair

Residence: Pocatello, Idaho.

Defendant Rulon D. Hair hereby demands a trial by jury.

ROY L. BLACK

JOHN R. BLACK

Attorneys for Defendant,

Rulon D. Hair

Residence: Pocatello, Idaho.

(Duly verified)

(Service acknowledged)

[Endorsed]: Filed March 3, 1943. [28]

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[Title of Court and Cause.]

### MINUTES OF THE COURT

March 22, 1943

This cause came on for hearing on the defendants' objections to plaintiffs' interrogatories filed herein, and also for hearing on the plaintiffs' motion to require the production of certain documents and records. Messrs. Glen A. Coughlin and B. W. Davis appeared as counsel for the plaintiffs and Messrs. A. L. Merrill and E. B. Smith, appeared for the defendants R. J. Reynolds Tobacco Company and R. L. Donnelly, Messrs. Black & Black appeared for the defendant Rulon D. Hair. After hearing argument of the respective counsel on the matter, the Court took the objections to the interrogatories under advisement.

The plaintiffs' motion to require the production of certain records and documents for the inspection

of the plaintiffs' counsel was taken under advisement by the Court after hearing arguments of counsel. [31]

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[Title of Court and Cause.]

## MINUTES OF THE COURT

March 23, 1943

Counsel for the respective parties being present, the Court announced his conclusions on the objections of the defendants to the interrogatories of the plaintiffs, and ordered as follows, to-wit:

As to interrogatories directed to the defendant, R. J. Reynolds Tobacco Company., the interrogatories numbered 3, 9, 13, 14, 15, 16, 21 and 22, the objections are sustained. The defendants' objections to all other interrogatories are overruled. The said defendant was given fifteen days in which to answer the same.

In interrogatories directed to the defendant L. R. Donnelly, interrogatories numbered 7, 9, 12, 19, 20, 23, 28, 29 and 30, the objections are sustained. The defendants' objections to all other interrogatories are overruled, and the said defendant was granted five days in which to answer the same.

In interrogatories directed to the defendant Rulon D. Hair, the interrogatories numbered 1, 3, 5, 17, 18, 25, 27 and 32, the objections are sustained. The defendant's objections to all other interrogatories are overruled, and the said defendant was given five days in which to answer the same.

The defendants asked and were granted excep-

tions to that portion of the order overruling objections.

The Court fixed 9:30 o'clock A. M. on March 24th, 1943, for disposition of the plaintiff's motion for an order requiring the defendants to produce certain records and documents, also for the resetting of the trial date for the cause. [32]

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[Title of Court and Cause.]

### MINUTES OF THE COURT

March 24, 1943

Comes now Messrs. Glenn A. Coughlin and B. W. Davis, counsel for the plaintiffs, with Messrs. Merrill & Merrill and E. B. Smith, attorneys for the defendants into court.

Whereupon the plaintiffs counsel waived all requirement of the defendants to answer the interrogatories issued by the plaintiffs and withdrew plaintiffs' motion to require the defendants to produce certain documents for the inspection of the plaintiffs.

The Court, thereupon, reset the cause for trial on March 29th, 1943, at 10 o'clock A. M. [33]

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[Title of Court and Cause.]

### MINUTES OF THE COURT

March 26, 1943

The plaintiffs' motion for leave to amend the complaint herein came on for hearing before the

Court. Counsel for the respective parties being present.

After hearing argument of B. W. Davis, Esquire, on the part of the plaintiff and A. L. Merrill, Esquire, on the part of the defendants, the Court took the motion under advisement. [34]

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[Title of Court and Cause.]

### MINUTES OF THE COURT

March 27, 1943

The Court announced his conclusions on the plaintiffs' petition to amend the complaint, and leave was granted to the plaintiff to make such amendment. The defendants asked and were granted exceptions.

The defendants were granted twenty days in which to answer the complaint as amended.

It was ordered that the setting of trial of the same be, and the same hereby is vacated, and the case is continued for the term.

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[Title of Court and Cause.]

### MINUTES OF THE COURT

March 30, 1943

The plaintiffs' notice of submitting proposed order, filed March 29th, 1943, was withdrawn by B. W. Davis, Esquire. [35]

[Title of Court and Cause.]

MOTION

Comes now the plaintiffs by and through their attorneys of record, and move the Court for an order permitting the filing of an amended complaint herein.

That said proposed amended complaint is attached hereto.

GLENN A. COUGHLAN

Res. & P. O. Address,

Montpelier, Idaho

B. W. DAVIS

Res. & P. O. Address,

Pocatello, Idaho.

Attorneys for Plaintiffs.

[Endorsed]: Filed April 5, 1943. [36]

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[Title of Court and Cause.]

OBJECTIONS TO FILING  
AMENDED COMPLAINT

Come now the R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the above named defendants, and file herewith their objections to the Motion of the plaintiffs for an order permitting the filing of an amended complaint in the above entitled cause, upon the following grounds:

I.

That said motion comes too late in that after the filing of the original complaint these defendants filed a Motion to Dismiss and for a More Definite



Statement, which said Motion was argued and presented to the court and thereafter denied; that within the time prescribed by the court these defendants filed answer to plaintiff's complaint and said cause was set down for trial and that after the setting and before trial plaintiffs moved to amend said complaint by interlineation, substantially as set out in Paragraph VII of said proposed amended complaint, which amendment by interlineation was allowed by the court over the objections of these defendants.

II.

That there are no reasons proposed by the plaintiffs for seeking permission to file said amended complaint and that said Motion is unsupported by any statement or affidavit. [37]

III.

That the proposed amended complaint confuses the theory of the original complaint of attempted recovery under the Idaho Guest Statute by trying to insert into said action an additional theory of negligence and by so co-mingling said theories as to make wholly uncertain as to the basis of plaintiff's claim for relief.

IV.

That said proposed amended complaint fails to state a claim upon which relief can be granted.

Wherefore, these defendants pray as follows:

1. That said Motion to file said proposed amended complaint be denied.
2. That if said Motion be granted and said proposed amended complaint filed, then these defend-

ants further pray that they be permitted to file such motions or other responsive pleadings thereto as is permitted to an original complaint in the first instance, and that they be given such enlarged time to file such pleadings as this court shall allow.

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

Residing at Pocatello, Idaho

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for above named

Defendants

(Affidavit of Service Attached)

[Endorsed]: Filed April 9, 1943. [38]

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[Title of Court and Cause.]

OBJECTIONS TO FILING AMENDED  
COMPLAINT

Comes now Rulon D. Hair, one of the above named defendants, and files herewith his objections to the Motion of the plaintiffs for an order permitting the filing of an amended complaint in the above entitled cause, upon the following grounds:

I

That said motion comes too late in that after the filing of the original complaint this defendant filed a Motion to Dismiss and for a More Definite Statement, which said Motion was argued and presented.



to the Court and thereafter denied; that within the time prescribed by the court this defendant filed answer to plaintiff's complaint and said cause was set down for trial and that after the setting and before trial plaintiffs moved to amend said complaint by interlineation, substantially as set out in Paragraph VII of said proposed amended complaint, which amendment by interlineation was allowed by the court over the objections of this defendant.

## II

That there are no reasons proposed by the plaintiffs for seeking permission to file said amended complaint and that said Motion is unsupported by any statement or affidavit.

## III

That said proposed amended complaint is an attempt to state an entirely new cause of action not stated in the original complaint and entirely change the cause of action against this defendant. [39]

## IV.

That said proposed amended complaint fails to state a claim upon which relief can be granted against this defendant.

Wherefore, this defendant prays as follows:

1. That said Motion to file said proposed amended complaint be denied.
2. That if said Motion be granted and said proposed amended complaint filed, then this defendant

further prays that he be permitted to file such motion or other responsive pleading thereto as is permitted to an original complaint in the first instance and that he be given such enlarged time to file such pleading as to this court shall seem meet and just.

ROY L. BLACK

JOHN R. BLACK

Attorneys for Defendant,

Rulon D. Hair

Residing at Pocatello, Idaho.

(Affidavit of Service Attached)

[Endorsed]: Filed April 9, 1943. [40]

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[Title of Court and Cause.]

### MINUTES OF THE COURT

April 9, 1943

The plaintiffs' motion for leave to file an amended complaint was presented to the Court, together with the objections filed. It was ordered that the motion be, and the same hereby is granted and proposed amended complaint submitted with the motion be filed. The defendants were granted twenty days in which to plead. [41]

[Title of Court and Cause.]

## AMENDED COMPLAINT

Comes now the plaintiffs and for a cause of action against the defendants, complain and allege:

### I.

That George H. Newby is a widower, the surviving husband of Avenell Newby, and the father of Richard Arlen Newby, age eight years and Patty Ann Newby, age six years, the minor children of Avenell Newby, deceased and the plaintiff; that he was, on the 28th day of September, 1942, by order of the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bear Lake, duly made and entered, duly and regularly appointed guardian ad litem for said Richard Arlen Newby, and Patty Ann Newby, with authority to institute, maintain and conclude this suit. That the said George H. Newby, Richard Arlen Newby and Patty Ann Newby, minors, are the sole and only heirs at law of the said Avenell Newby, deceased.

### II.

That the R. J. Reynolds Tobacco Company for several years immediately prior to the filing of this complaint, has been and now is a corporation organized and existing under the laws of the State of North Carolina and doing business in the State of Idaho as a foreign corporation without having

complied with the laws of Idaho relating to foreign corporations qualifying to do business in said State.

### III.

That at all times hereinafter mentioned the defendant, L. R. Donnelly, was a citizen and resident of the State of Utah with his place of business and residence in Salt Lake City, State of Utah. [42]

### IV.

That on the 11th day of September, 1942 and at the time of the filing of plaintiffs' complaint in the District Court of the County of Bear Lake, Idaho, on or about the 28th day of September, 1943, the defendant, Rulon D. Hair was a citizen and a resident of the State of Idaho.

### V.

That the defendant, Rulon D. Hair, at all times hereinafter mentioned was the duly authorized agent, servant and employee of the defendant, R. J. Reynolds Tobacco Company, and the defendant, L. R. Donnelly and was at all times hereinafter mentioned engaged in the course, scope and line of his business for the above mentioned defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly.

### VI.

That at all times hereinafter mentioned the defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, were the owners of and furnished to the defendant, Rulon D. Hair, a Chevrolet Panel

Truck, bearing State of Idaho truck license 3A-150, which was used by said Hair in the prosecution of the business of said defendants in the line, course, and scope of the employment of said Hair as an employee of said defendants.

## VII.

That at all times herein mentioned the said defendant, Rulon D. Hair had permission and authority from the said R. J. Reynolds Tobacco Company and L. R. Donnelly, to use and operate said Chevrolet Panel truck upon the public highways of the State of Idaho, notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instruction. [43]

## VIII.

That on the 11th day of September, 1942, on the public highway known as U. S. Highway No. 30 North, at a point on said highway about seventeen miles north of Montpelier, Idaho, the said Rulon D. Hair, with a reckless disregard of the rights of others and of Avenell Newby, so recklessly drove and operated the said panel truck hereinabove referred to that the same ran off the said highway, tipped over and inflicted serious injuries upon said Avenell Newby from which she died on the 16th day of September, 1942, and at said time and place said Avenell Newby was riding with Rulon D. Hair as his guest and was a guest of the defendants herein.



## IX.

That the said Avenell Newby was of the age of twenty-eight years; was a strong, healthy women, capable of making a home and doing the housework for the plaintiff, George H. Newby and their minor children, Richard Arlen Newby and Patty Ann Newby, had she lived. That she was a kind and friendly person and was devoted to her family. That the minor children were dependent upon her for their care and guidance. That by reason of her death, her husband, George H. Newby, has lost the love, comfort and companionship of a devoted wife. That the minor children, Richard Arlen Newby and Patty Ann Newby have lost the love, comfort and care and companionship that only their mother could give, to the damage of the said George H. Newby and Richard Arlen Newby and Patty Ann Newby, in the sum of \$100,000. That by reason of the injuries resulting in the death of the deceased, Avenell Newby, expenses were incurred for medical services in the amount of \$115.00, and for funeral and burial services in the amount of \$268.20.

Wherefore, the plaintiff, George H. Newby on his own behalf and as guardian ad litem for Richard Arlen Newby and Patty Ann Newby, prays for damages against the defendants and each of them for the amount of One Hundred Thousand Dollars general damages, [44] and \$115.00 for medical services and \$268.20 funeral and burial expenses; for their costs of suit herein expended and for such other and



further relief as may be found just and equitable in the premises.

GLENN A. COUGHLAN

Res. & P.O. Address: Montpelier, Idaho

B. W. DAVIS

Res. & P.O. Address: Pocatello, Idaho

Attorneys for Plaintiffs.

[Endorsed]: Filed April 9, 1943. [45]

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[Title of Court and Cause.]

**MOTION TO DISMISS, MOTION FOR MORE  
DEFINITE STATEMENT, AND MOTION  
TO STRIKE DIRECTED TO AMENDED  
COMPLAINT**

Come now defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, and each of them, and moves the court as follows:

1. To dismiss the action because the amended complaint fails to state a claim against these defendants or either of them upon which relief can be granted;

2. To dismiss the action because the amended complaint shows upon its face lack of jurisdiction of the court over the persons of Richard Arlen Newby and Patty Ann Newby, minors, and each of them, because (a) there is no general guardian who appears for or on behalf of either of said minors, (b)

there is no guardian ad litem appointed pursuant to Rule 9 and 58 of the Rules of the Practice of the United States District Court for the District of Idaho, and George H. Newby, who purports to appear as guardian ad litem for said minors is not qualified, pursuant to the rules aforesaid, to act in such capacity.

3. Without waiving the foregoing motions, but expressly relying thereon, these defendants and each of them, further moves the court to require plaintiffs to make a more definite statement of their purported cause of action as follows: [46]

(a) State what relationship plaintiffs will contend existed between R. J. Reynolds Tobacco Company and L. R. Donnelly and the manner in which and the reason for Rulon D. Hair acting as agent of both of said defendants at the times and in the manner alleged in Paragraph V of said amended complaint, and more particularly what type of service it will be contended said Rulon D. Hair was rendering that would enable him to act within the course, scope and line of business or claimed agency of said defendants, either jointly or severally, at the times mentioned in said amended complaint;

(b) State what particular acts referred to in Paragraph VII of said amended complaint which it is inferred were committed by Rulon D. Hair and the times of their commission and the character thereof, and which plaintiffs contend came to the knowledge of R. J. Reynolds Tobacco Company and L. R. Donnelly by virtue whereof plaintiffs claim these defendants, and each of them, knew that Hair

was a careless, reckless and incompetent driver of an automobile; also the particular "instructions" which it is alleged were violated in the charge that Rulon D. Hair was in the habit of hauling guests;

(c) State the particular acts which plaintiffs will contend constituted a reckless disregard of the rights of others and of Avenell Newby, and the acts which plaintiffs will contend constituted reckless driving and operation of said panel truck as alleged, and at the time alleged, in Paragraph VIII of said complaint.

4. Upon the ground that the same is immaterial, these defendants move to strike from said amended complaint the following:

(a) All that portion of Paragraph numbered II reading as follows: [47]

"and doing business in the state of Idaho as a foreign corporation without having complied with the laws of Idaho relating to foreign corporations qualified to do business in said state."

(b) All that portion of Paragraph numbered VII reading as follows:

"Notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instructions."

These motions are made individually and separately but consolidated pursuant to Rule 12 (g).

Wherefore, defendants pray said motions and each of them be granted and said defendants be given the relief sought thereby.

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

Residing at Pocatello, Idaho

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys For Defendants

R. J. Reynolds Tobacco

Co., And L. R. Donnelly

(Service Acknowledged)

[Endorsed]: Filed April 26, 1943. [48]

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[Title of Court and Cause.]

MOTION TO DISMISS, MOTION FOR MORE  
DEFINITE STATEMENT, DIRECTED TO  
AMENDED COMPLAINT.

Comes now defendant Rulon D. Hair, and moves the court as follows:

1. To dismiss the action because the amended complaint fails to state a claim against this defendant upon which relief can be granted;

2. To dismiss the action because the amended complaint shows upon its face lack of jurisdiction of the court over the persons of Richard Arlen Newby and Patty Ann Newby, minors, and each of them, because (a) there is no general guardian who ap-

pears for or on behalf of either of said minors, (b) there is no guardian ad litem appointed pursuant to Rule 9 and 59 of the Rules of the Practice of the United States District Court for the District of Idaho, and George H. Newby, who purports to appear as guardian ad litem for said minors is not qualified, pursuant to the rules aforesaid, to act in such capacity;

3. Without waiving the foregoing motions, but expressly relying thereon, this defendant further moves this court to require plaintiffs to make more definite statement of their purported cause of action as follows:

(a) State what particular acts referred to in paragraph 7 of said Amended Complaint which it is inferred were committed by this defendant, Rulon D. Hair, and the times of their commission and the character thereof which it is alleged constitute careless, reckless and incompetent driving [49] of an automobile; and state at what times and on what occasions it is going to be contended this defendant hauled guests contrary to instructions also set forth what instructions are claimed to be referred to that the acts of this defendant were contrary to.

(b) State the particular acts which plaintiffs will contend constituted a reckless disregard of the rights of others and of Avenell Newby, and the acts which plaintiffs will contend constituted reckless driving and operation of said panel truck as alleged, and at the time alleged, in Paragraph VIII of said complaint.



These motions are made individually and separately but consolidated pursuant to Rule 12 (g).

Wherefore, this defendant prays said motions and each of them be granted and said defendant be given the relief sought thereby.

ROY L. BLACK

JOHN R. BLACK

Attorneys For Defendant, Ru-  
lon D. Hair. Residing at  
Pocatello, Idaho.

(Service Acknowledged)

[Endorsed]: Filed April 28, 1943. [50]

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[Title of Court and Cause.]

### ORDER

On April 26, 1943, defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, filed their motion to dismiss; motion for more definite statement and motion to strike, directed to the amended complaint.

The matter was fully presented by briefs, filed by respective counsel, and the Court being advised, it is Ordered that:

The motion to dismiss is denied.

The motion for more definite statement is denied.

The motion to strike is sustained as to the following portion of paragraph II of the amended complaint: "without having complied with the laws of Idaho relating to foreign corporations qualified to



do business in said state." As to all other portions the motion is denied.

Dated this 6th day of July 1943.

CHASE A. CLARK

United States District Judge.

[Endorsed]: Filed July 6, 1943. [51]

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[Title of Court and Cause.]

ORDER

On April 28, 1943 defendant Rulon D. Hair filed his motion to dismiss and motion for more definite statement, directed to the Amended Complaint.

The matter was submitted and fully considered and the Court being advised, it is Ordered that:

The motion to dismiss be and the same is denied.

The motion for more definite statement be and the same is denied.

Dated this 6th day of July 1943.

CHASE A. CLARK

United States District Judge.

[Endorsed]: Filed July 6, 1943. [52]

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[Title of Court and Cause.]

ANSWER OF R. J. REYNOLDS TOBACCO  
COMPANY and L. R. DONNELLY TO  
AMENDED COMPLAINT.

Come now R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the defendants in the above-

entitled cause, and, for answer to the complaint of the plaintiffs on file herein, admit, deny and allege as follows:

### FIRST DEFENSE

That the amended complaint fails to state a claim against these answering defendants, or either of them, upon which relief can be granted.

### SECOND DEFENSE

#### I.

These defendants deny each and every allegation of said amended complaint not hereinafter specifically admitted.

#### II.

Answering paragraph numbered I of said amended complaint, these defendants admit the allegations contained therein, save and except defendants deny that George H. Newby was duly and regularly appointed guardian ad litem for Richard Arlen Newby and Patty Ann Newby, and denies the legal effect alleged of the order pleaded in said paragraph. [53]

#### III.

Answering paragraph numbered II of said amended complaint, these defendants admit that the R. J. Reynolds Tobacco Company for several years immediately prior to the filing of said complaint has been, and that it now is, a corporation organized and existing under the laws of the State of North Carolina, but deny the remaining allegations of said paragraph.

IV.

These defendants admit the allegations contained in paragraph numbered III of said amended complaint.

V.

Answering paragraph numbered IV of said amended complaint, these defendants deny the allegations contained therein, and allege in this respect that on the date of the filing of the original complaint in the District Court of Bear Lake County, State of Idaho, to wit: on or about the 28th day of September, 1942, the defendant Rulon D. Hair was, and for some time prior thereto had been, and now is, a bona fide resident and citizen of the State of Utah.

VI.

Answering paragraph numbered V of said amended complaint, these defendants deny each and every allegation contained therein. Further answering said paragraph, defendants allege that the said Rulon D. Hair had been acting as a salesman for the R. J. Reynolds Tobacco Company prior to the 11th day of September, 1942, but was not so acting on said date and was not acting as an agent, servant or employee of these defendants or either of them, or in any other capacity, with reference to any of the matters or things alleged in said amended complaint, and none of said alleged acts were committed by the said Rulon D. Hair within the course, scope or line of any agency, business or employment by or for the R. J. Reynolds Tobacco Company or L. R. Donnelly, and for which acts, if any were committed,

neither the said R. J. Reynolds tobacco [54] Company or the said L. R. Donnelly are in anywise liable.

## VII.

Answering paragraph numbered VI of said amended complaint, these defendants deny each and every allegation contained therein. Further answering said paragraph, however, defendants allege that the Chevrolet Panel Truck therein described was the property of R. J. Reynolds Tobacco Company, but that it was not used by the said Rulon D. Hair at the time of the matters and things alleged in said complaint in the prosecution of any business or agency of these answering defendants or either of them, or as agent, servant or employee of either of said defendants, and its use at such time and for the purposes alleged in said complaint was without right or permission of these answering defendants, and they are in no wise responsible for any damages, if any occurred, as the result thereof.

## VIII.

Answering paragraph numbered VII of said amended complaint, these defendants admit that Rulon D. Hair had permission and authority to use and operate said Chevrolet Panel Truck when actually engaged in the business of the company, but deny that he was so engaged on the 11th day of September, 1942, and deny that these defendants, or either of them, knew that the said Rulon D. Hair was a careless, reckless or incompetent driver of an automobile or that he was in the habit of hauling

guests in said car. In this respect defendants further deny that the said Rulon D. Hair was a careless, reckless or incompetent driver of an automobile, and deny that he hauled guests therein. These defendants allege that the said Rulon D. Hair had been given instructions not to haul or carry guests in said automobile or panel truck, and further allege that if there has been an infraction of this instruction, the same was without the knowledge or consent of these answering defendants or either of them. Defendants deny each and every other allegation contained in said paragraph. [55]

### IX.

Answering paragraph numbered VIII of said amended complaint, these defendants admit that on the 11th day of September, 1942 on a public highway, known as U. S. Highway #30 North, at a point on said highway about 17 miles north of Montpelier, Idaho, the defendant Rulon D. Hair, while driving said Panel Truck, ran off the highway, tipped over, and that certain injuries were inflicted upon Avanell Newby, and admits that Avanell Newby died on the 16th day of September, 1942, but deny each and every other other allegation contained in said paragraph. Further answering said paragraph, these defendants allege that if the said Avanell Newby was riding in said Panel Truck as the guest of Rulon D. Hair or with his consent, the same was without the consent or permission of these answering defendants or either of them, and contrary to positive instructions theretofore given the said Rulon



D. Hair, and if the said Rulon D. Hair transported the said Avanell Newby in said Panel Truck as a guest or otherwise, the same was without authority of these defendants, and without the scope of his employment, and for the consequence of which neither of these answering defendants are liable.

### X.

Answering paragraph numbered IX of said amended complaint, these defendants admit that Avanell Newby was of the approximate age of 28 years. Defendants deny that by reason of her death the plaintiffs have been damaged in any sum or amount whatever, by reason of any act or omission on the part of these defendants or either of them. Defendants are without knowledge or information sufficient to form a belief as to the remaining allegations of said paragraph, and upon this ground deny each and every other allegation contained therein. [56]

### THIRD DEFENSE

Further answering said amended complaint, and as an additional defense thereto, these defendants allege that any injuries which the said Avanell Newby may have received in the accident described in the amended complaint and the damages to the plaintiffs, if any, resulting therefrom were proximately caused or contributed to by the negligence and carelessness of the said Avanell Newby, who was then and there guilty of contributory negligence, and said injuries were not the result of negligence or want of care on the part of any of the defendants charged in said amended complaint.



## FOURTH DEFENSE

Further answering said amended complaint, and as a separate and further affirmative defense thereto, these defendants allege that at the time and place mentioned in said amended complaint the said Avannell Newby was, and for some time prior thereto had been, riding in said panel truck as a gratuitous guest of Rulon D. Hair and at her special request; that she had been with the said Rulon D. Hair for a number of hours prior to said accident and all matters and things touching said association and the operation of said panel truck by the said Rulon D. Hair were fully known to her and freely acquiesced in by her, and having such information she continued to ride in said panel truck and acquiesced in each and everything done with respect thereto, and of said association, and the driving of said panel truck, and with such knowledge and acquiescence on her part and the riding in said truck with the said Rulon D. Hair at her own request and as his gratuitous guest she thereby assumed all risk attendant thereon and by reason of her acquiescence and of her own conduct no recovery can be had for any damages, if any, which may have resulted from the accident alleged in said amended complaint.

## FIFTH DEFENSE

Further answering said amended complaint and as a separate [57] and further affirmative defense thereto, these defendants allege that the injuries which Avannell Newby may have sustained, and the

damages thereby suffered, if any, by the plaintiffs were the result of matters and things over which the driver of said automobile had no control, and said accident occurred without fault on his part and without fault, liability or responsibility of any kind whatever on the part of these answering defendants.

Wherefore, these defendants pray that plaintiffs take nothing by reason thereof, and that defendants recover their costs incurred herein.

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

Residing at Pocatello, Idaho

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for R. J. Reynolds Tobacco Company  
and L. R. Donnelly

(Duly verified.) [58]

The defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, hereby demand a trial by jury.

E. B. SMITH

A. L. MERRILL

R. D. MERRILL

Attorneys for Defendants  
R. J. Reynolds Tobacco  
Company & L. R. Donnelly.

(Service Acknowledged.)

[Endorsed]: Filed July 15, 1943. [59]

[Title of Court and Cause.]

ANSWER OF DEFENDANT RULON D. HAIR

Comes now the defendant Rulon D. Hair and for answer to plaintiffs' Amended complaint this defendant admits, denies and alleges as follows:

I

That said amended complaint fails to state a claim or cause of action against this answering defendant upon which relief can be granted to plaintiffs or either of any of them.

SECOND DEFENSE.

I

This defendant denies each and every allegation of said complaint not herein specifically admitted.

II

Answering paragraph I of the Amended Complaint this defendant admits the allegations thereof.

III

Answering paragraph II of the amended complaint this defendant admits that defendant R. J. Reynolds Tobacco Company, for several years immediately prior to the filing of this amended complaint, has been and now is a corporation but denies each and every other allegation of said paragraph II.

IV

Answering paragraph III of the amended complaint this defendant admits the allegations thereof.

## V

Answering paragraph IV of said amended complaint this defendant denies [60] each and every allegation thereof and further answering said paragraph IV of said amended complaint this defendant alleges the fact to be that at the time of the filing of the complaint herein this defendant was and ever since said time has been and now is a citizen of and a resident of the State of Utah.

## VI

Answering paragraph V of said amended complaint this defendant admits that prior to the accident mentioned in the complaint he had been an employee of the said defendant R. J. Reynolds Tobacco Company, a corporation, as a salesman, and this defendant denies each and every other allegation of said paragraph.

## VII

Answering paragraph VI of said amended complaint this defendant admits that at the times mentioned in the amended complaint defendant R. J. Reynolds Tobacco Company furnished to this defendant a Chevrolet Panel Truck, bearing State of Idaho Truck License #3A-150 which was used by this defendant in the prosecution of his business and in his capacity as employee and salesman for said defendant R. J. Reynolds Tobacco Company and defendant denies each and every other allegation of said paragraph VI.

## VIII

Answering paragraph VII of said complaint this defendant admits that at the times herein mentioned he had permission and authority from the defendant R. J. Reynolds Tobacco Company to use and operate said Chevrolet Panel Truck upon the public highways of the State of Idaho in the carrying on of his business as employee and salesman for said defendant R. J. Reynolds Tobacco Company and this defendant denies that this defendant was a careless, [61] or that he was a reckless or that he was an incompetent driver of an automobile and denies each and every other allegation of said paragraph.

## IX

Answering paragraph VIII of said amended complaint this defendant admits that on to-wit: The 11th day of September, 1942, on the public highway known as U. S. Highway #30 N at a point about seventeen miles north of Montpelier, Idaho, the said truck, ran off the said highway, tipped over and inflicted injuries upon said Avanell Newby and that at said time and place said Avanell Newby was riding with this defendant but denies each and every other allegation of said paragraph.

Further answering said allegations defendant alleges that said Avanell Newby was riding in said truck with said defendant at her own request and instance and without any invitation from this defendant and said Avanell Newby having requested the defendant to permit her to ride with him to Montpelier, Idaho and that she was so riding with



the defendant at the time of the said accident alleged in the amended complaint.

## X

Answering paragraph IX of said amended complaint this defendant admits that the said AvaneU Newby was of about the age of 28 years; denies each and every other allegation of said paragraph IX; this defendant specifically denies that said George H. Newby, Richard Arlen Newby and Patty Ann Newby have been damaged in any sum or amount whatever by reason of any act or omission on the part of this defendant.

## THIRD DEFENSE.

Further answering said Amended Complaint and as an additional defense thereto this defendant alleges:

### I

That any injuries which the said AvaneU Newby may have received in the accident described in the Amended Complaint and the damages to plaintiffs, if any, resulting therefrom, were proximately caused or contributed to by the negligence of said AvaneU Newby who was then and there guilty of contributory negligence and that the said injuries were not the result of [62] negligence or want of care on the part of this defendant.

## FOURTH DEFENSE.

Further answering the said Amended Complaint and as a further, separate and affirmative defense thereto this defendant alleges:



That at the time and place mentioned in said amended complaint the said Avanell Newby was, and for some time prior thereto had been, riding in said automobile with this defendant as a gratuitous guest of this defendant and solely at and by her own request, and that all matters and things touching said truck and the operation of said truck or automobile by this defendant, as the same was being operated, were fully known to the said Avanell Newby, and, having such information, she continued to ride in said automobile truck and acquiesced in and joined with this defendant in each and everything done with respect thereto, and with respect to the driving of the said automobile as then being driven by this defendant and with such knowledge and acquiescence and her riding in said automobile truck with this defendant solely at her own request and instance and as a gratuitous guest, she thereby assumed all risk attendant thereon and by reason whereby no recovery can be had for any damages, if any, which may have resulted to her or to any of the plaintiffs from the said accident alleged in the amended complaint.

#### FIFTH DEFENSE:

Further answering said Amended Complaint and as a further defense thereto this defendant alleges that the injuries which the said Avanell Newby may have sustained and any damages suffered by the plaintiffs herein, were the result of matters and things over which this defendant had no control and the said accident occurred without fault, without

carelessness and without negligence on the part of this defendant.

Wherefore, having fully answered said Amended Complaint this defendant prays that plaintiff take nothing by reason thereof and this defendant recover his costs incurred herein.

ROY L. BLACK

JOHN R. BLACK

Attorneys for Defendant Rulon D. Hair. Residence: Pocatello, Idaho. [63]

Defendant Rulon D. Hair hereby demands a trial by jury.

ROY L. BLACK

JOHN R. BLACK

Attorneys for Defendant, Rulon D. Hair, Residence; Pocatello, Idaho.

(Duly verified.)

(Service Acknowledged)

[Endorsed]: Filed July 15, 1943. [64]

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[Title of Court and Cause.]

## MINUTES OF THE COURT

August 18, 1943

The plaintiffs' Motion to Strike from the Answers of the several defendants and all objections to interrogatories by the respective parties came on for

hearing before the Court. Glenn A. Coughlan, Esquire, appeared as counsel for the plaintiffs and E. B. Smith, Esquire, appeared for all the defendants except Rulon D. Hair.

On Motion by plaintiffs' counsel and with consent of counsel for the defendants, the Court granted leave to amend the Motion to Strike by interlineation.

On stipulation of counsel the Motions as regard to the defendant Rulon D. Hair, were submitted without argument.

The Court heard argument of respective counsel on the Motion to Strike from the Answer of the defendants R. J. Reynolds Tobacco Co. and L. R. Donnelly, and also the objection to interrogatories and took the same under advisement.

The Court ordered that all interrogatories, that may be sustained by the Court, be answered by the respective parties to whom they are directed by September 15, 1943. [65]

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[Title of Court and Cause.]

**MOTION TO REQUIRE PLAINTIFFS TO  
ELECT, AND TO STRIKE**

Comes now R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the defendants above named, and move the Court as follows:

**I.**

That plaintiffs be required to elect upon which theory they intend to rely for a verdict in this case, that is to say:

(a) Whether they intend to rely upon claimed negligence of the defendants R. J. Reynolds Tobacco Co. and L. R. Donnelly in allegedly permitting Rulon D. Hair to use and operate the Chevrolet Panel truck, under the claimed circumstances as alleged by plaintiffs in paragraph VII of their Amended Complaint, or

(b) Whether they intend to rely upon the theory, that Avenell Newby was riding as a guest with Rulon D. Hair at the time of the accident, as alleged by plaintiffs in paragraph VIII of said Amended Complaint, governed and controlled by I.C.A. sec. 48-901, as amended by Ida. Sess. Laws 1939, Chap. 160, P. 285-286, the so-called Guest Statute.

## II.

To strike from said amended complaint all allegations tending to support the theory not elected by plaintiffs. [66]

Dated October 20, 1943.

A. L. MERRILL

R. D. MERRILL

Residing at Pocatello, Idaho

E. B. SMITH

Residing at Boise, Idaho

Attorneys For The Defendants R. J. Reynolds Tobacco Company And L. R. Donnelly.

(Service Acknowledged)

[Endorsed]: Filed Oct. 20, 1943. [67]

[Title of Court and Cause.]

MOTION TO REQUIRE PLAINTIFFS TO  
ELECT AND TO STRIKE

Comes now Rulon D. Hair, one of the defendants  
above named, and moves the court, as follows:

I

That plaintiffs be required to elect upon which  
theory they intend to rely for a verdict in this case,  
that is to say:

a. Whether they intend to rely upon the  
alleged negligence of this defendant, Rulon D.  
Hair, or

b. Whether they intend to rely upon the  
theory that Avenell Newby was riding as a  
guest with Rulon D. Hair at the time of the  
accident as alleged in paragraph 8 of the  
amended complaint governed and controlled by  
I.C.A. Section 48-901 as amended by Idaho Ses-  
sion Laws 1939 Chapter 160, Page 285-6, the  
so-called Guest Statute.

II

To strike from said amended complaint all allega-  
tions tending to support the theory not elected by  
plaintiffs.

Dated October 20, 1943.

ROY L. BLACK &  
JOHN R. BLACK

Residing at Pocatello, Idaho,  
Attorneys for said defendant  
Rulon D. Hair

(Service Acknowledged)

[Endorsed]: Filed Oct. 20, 1943. [68]

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[Title of Court and Cause.]

## MINUTES OF THE COURT

October 20, 1943

This cause came on for trial before the Court and a jury, Messrs. B. W. Davis and Glenn A. Coughlan appearing for the plaintiffs; and Messrs. A. L. Merrill and E. B. Smith appearing for the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, and R. L. Black for the defendant Rulon D. Hair.

Motions on the part of all defendants to require the plaintiffs to elect were presented by the defendants' counsel, and were by the Court denied.

The Clerk, under directions of the Court, proceeded to draw from the jury box the names of twelve persons, one at a time, written on separate slips of paper, to secure a jury. Mrs. Jessie Finlayson, Mrs. Grace Keppner, Leonard Bjorkman, O. M. Hess, and George E. Gibby, whose names were drawn, were excused for cause; and Mrs. Alma



Rudd and Ross L. Holcomb whose names were also drawn, were excused on the defendants' peremptory challenge.

Following are the names of the persons whose names were drawn from the jury box, who were sworn and examined on voir dire found duly qualified, and who were sworn to well and truly try said cause and a true verdict render, to-wit:

Olive Kelly

George Ball

Abner Widdison

Merle Miller

George Rinehart

Joseph N. Arbon

Talmadge Mickelson

Lloyd B. Robinett

Mrs. Clara Butler

W. O. Creer

Elmer Christensen

Nellie Garretson

After a statement of the plaintiffs' cause by their counsel, Mike McGuire and A. P. Brunderson were sworn and examined as witnesses on the part of the plaintiffs.

After admonishing the jury, the Court excused them to 10 o'clock A. M., on Thursday, October 21, 1943, and continued the trial to that time. [69]

[Title of Court and Cause.]

## MINUTES OF THE COURT

October 21, 1943

The trial of this cause was resumed before the Court and jury. Counsel for the respective parties being present, it was agreed that members of the jury were all present.

A. P. Bunderson was recalled and further examined and Dr. R. B. Lindsay, George H. Newby, Rosetta Tuescher, Sid Case, Martin Manly, F. H. Smullen, and Dan Buster were sworn and examined as witnesses on the part of the plaintiff; and L. R. Donnelly and R. D. Hair were called for cross-examination, and were sworn and cross-examined by the plaintiff.

Documentary evidence was introduced on the part of both the plaintiffs and defendants.

After admonishing the jury, the Court excused them to 10 o'clock A. M., on October 22, 1943, and continued the trial to that time. [70]

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[Title of Court and Cause.]

## MINUTES OF THE COURT

October 22, 1943

The trial of this cause was resumed before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

Wesley Tucher and Calvin Tucher were sworn and examined as witnesses, and the cross-examina-

tion in the deposition of the witness E. A. Darr was read in evidence on the part of the plaintiffs. The direct evidence of said witness was read in evidence on the part of the defendants, and documentary evidence was introduced on the part both of the plaintiffs and of the defendants, and here the plaintiffs rest.

Counsel for the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, moved the Court to strike from the record the oral testimony of the witness Sid Close, which Motion was granted by the Court.

After a statement of the defense by counsel for the respective defendants Rulon D. Hair, Carl Oxenbine and Jack Perkins were sworn and examined, and L. R. Donnelly was recalled and examined as witnesses on the part of the defendants.

The deposition of Durwood Perkins, a witness on the part of the defendants, was read in evidence and documentary evidence was introduced on the part of both the plaintiffs and defendants, and here both sides close.

The plaintiffs' counsel moved the Court to restore to the record the testimony of the witness Sid Close. The Motion was denied by the Court.

Counsel for the respective defendants moved the Court to instruct the jury to return a verdict in favor of the defendants. The Court took the Motions under advisement.

After admonishing the jury, the Court excused them to 10 o'clock A. M. on October 23, 1943, and continued the trial to that time. [71]

[Title of Court and Cause.]

### VERDICT

We, the jury in the above entitled cause, find for the plaintiffs, and against the defendants R. J. Reynolds Tobacco Company, L. R. Donnelly, and Rulon D. Hair, and fix plaintiffs' damages against said defendants at the sum of \$7500.00.

MERLE A. MILLER

Foreman

[Endorsed]: Filed Oct. 23, 1943. [72]

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[Title of Court and Cause.]

### MINUTES OF THE COURT

October 23, 1943

This cause came on for further trial before the Court and jury. Counsel for the respective parties being present, it was agreed that the members of the jury were all present.

The Court announced his conclusions on the defendants' Motion for an instructed verdict, and denied the same.

The cause was argued before the jury by counsel, for the respective parties, after which the Court instructed the jury and placed them in charge of a bailiff duly sworn, and they retired to consider of their verdict. Counsel for the respective defendants excepted the instructions of the Court to the jury.

On the same day the jury returned into Court,

counsel for respective parties being present, whereupon the jury presented their written verdict, which was in the words following:

[Title of Court and Cause.]

VERDICT

“We, the jury in the above entitled cause, find for the plaintiffs, and against the defendants R. J. Reynolds Tobacco Company, L. R. Donnelly, and Rulon D. Hair, and fix plaintiffs’ damages against said defendants at the sum of \$7500.00.

MERLE A. MILLER,  
Foreman.”

The verdict was recorded in the presence of the jury and then read to them, and they each confirmed the same.

Exception to the verdict was taken by counsel on the part of each individual defendant. [73]

In the District Court of the United States, In and  
For the District of Idaho, Eastern Division

No. 1196

GEORGE H. NEWBY, in his own behalf; RICH-  
ARD ARLEN NEWBY, and PATTY ANN  
NEWBY, both minors, by their Guardian Ad  
Litem, GEORGE H. NEWBY,

Plaintiffs,

vs.

R. J. REYNOLDS TOBACCO COMPANY, L. R.  
DONNELLY and RULON D. HAIR,

Defendants.

### JUDGMENT ON VERDICT

This matter having come on regularly for trial to  
a jury which has returned its verdict herein.

Now, Therefore, It Is Ordered, Adjudged, and  
Decreed, That plaintiffs have and recover of and  
from the said defendants, jointly and severally, the  
sum of Seven Thousand Five Hundred Dollars  
(\$7,500.00) damages, together with plaintiffs' costs  
and disbursements incurred herein assessed in the  
sum of \$89.40.

Witness, The Honorable Chase A. Clark, Judge  
of the above entitled Court, and the seal thereof,  
this 23rd day of October, 1943.

W. D. McREYNOLDS

[Seal]

Clerk

[Endorsed]: Filed Oct. 23, 1943. [74]



[Title of Court and Cause.]

PETITION ON MOTION FOR JUDGMENT  
NOTWITHSTANDING VERDICT AND, IN  
THE ALTERNATIVE, FOR A NEW TRIAL

Come Now R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the above named defendants, and move the court to set aside the verdict and judgment entered thereon, and enter judgment in their favor notwithstanding the verdict in accordance with the motion made by said defendants for a directed verdict which motion was made by said defendants at the conclusion of all the evidence, and is summarized as follows:

(a) That the evidence is wholly insufficient to support a verdict for the plaintiffs and against these defendants, more particularly because said evidence failed to show that Rulon D. Hair, at the time of said accident and for a number of hours theretofore, was acting as an agent or employee of said defendants, or either of them, or at the time of said accident was acting within the scope of his employment or doing anything in the furtherance of his employer's business, but on the contrary the evidence conclusively shows that at the time of said accident and for a number of hours theretofore the said Rulon D. Hair was on a pleasure party of his own and was not acting for said defendants, or either of them, nor within the scope of his employment; (b) that the evidence conclusively shows that Avenell Newby was riding in the automobile involved in said accident as a gratuitous guest of [75] Rulon D. Hair, and that Rulon D. Hair, at said time, had no au-

thority of any kind or character from either R. J. Reynolds Tobacco Company or L. R. Donnelly to haul guests in said car, but on the contrary was under positive written and oral instructions to never, at any time, permit any one to ride in said car except an employee of the company, and in hauling Avenell Newby he was acting entirely without the scope of his employment.

(c) That the evidence was wholly insufficient to show either that Rulon D. Hair was a careless, reckless or incompetent driver or that the said R. J. Reynolds Tobacco Company or L. R. Donnelly knew or had reason to know that the said Rulon D. Hair was a careless or reckless or incompetent driver.

(d) That the evidence failed to show that, at the time of said accident, the said Rulon D. Hair was in any way guilty of violating the gratuitous guest statute of the state of Idaho or that he was guilty of reckless disregard of the rights of Avenell Newby. That at the time of said accident and for some time prior thereto, the said Avenell Newby was riding in said automobile as a guest of Rulon D. Hair, and at her instance and request; that immediately prior to said accident she was in a position to be as observant of all surrounding conditions and of all acts or omissions, if any, on the part of the said Hair as was Hair himself; that she was conscious and could observe the acts of the defendant in the operation of said automobile, but that she made no protests or objections to anything done or omitted by the said Rulon D. Hair, but acquiesced in his conduct and in the operation of said automobile.

(e) That the evidence introduced and admitted

for the purpose of showing Rulon D. Hair to be a careless, reckless or incompetent driver was wholly and completely insufficient as matter of law to establish the status of incompetency or carelessness or recklessness on the part of said Rulon D. Hair. [76]

Said defendants refer to the motion as made in open court and as the same appears in the notes of the Reporter for full particulars.

In the event of a failure of the court to grant said motion for judgment notwithstanding the verdict, then said defendants move for an order setting aside the verdict and judgment rendered herein and granting a new trial pursuant to Rule 50 of the Rules of Federal Procedure, and the Rules of this court, upon the following grounds:

### I.

Insufficiency of the evidence to justify the decision or verdict, and that it is against the law in this, to-wit:

(a) The evidence fails to show that at the time of the accident in which Avenell Newby was injured, the said Rulon D. Hair was acting as an agent, servant or employee of these defendants, or either of them, but on the contrary the evidence conclusively proves that at said time and for approximately eighteen hours theretofore the said Rulon D. Hair was not acting as such agent, servant or employee, nor within the scope of any employment of these defendants, or either of them, but on the contrary was engaged entirely with the said Avenell Newby on a pleasure party involving only the interests of the said Rulon D. Hair and Avenell Newby. That the presumption, if any, of the

status of a driver of an automobile owned by another as to the driver's agency was in this case completely and wholly destroyed and overcome by the positive, undisputed testimony introduced in said cause showing clearly that the said Rulon D. Hair was not acting for his employer at the time of said accident, but wholly and completely in the furtherance of a purpose of his own.

(b) It is undisputed that Avenell Newby was riding in said automobile at the time of said accident as a gratuitous [77] guest of Rulon D. Hair, transported by him in said automobile as a guest contrary to positive written and oral instructions forbidding the hauling of guests or any person other than an employee of the defendant corporation. The evidence is completely and wholly insufficient as a matter of law to prove a waiver of said instructions to the said Rulon D. Hair on the part of either L. R. Donnelly or the R. J. Reynolds Tobacco Company.

(c) That the Meyers incident and the Dubois incident referred to in the evidence are wholly insufficient as a matter of law to prove the said Rulon D. Hair was an incompetent, careless or reckless driver, and does not establish his status as such, and save for the Meyers incident there is no evidence showing, or tending to show, that the said R. J. Reynolds Tobacco Company or L. R. Donnelly had any knowledge or information of any kind or character that the said Rulon D. Hair had ever been involved in any accident, and that the evidence, on the contrary, shows that he had a record showing a high degree of competency and care in the use of



said defendant's automobile; that the evidence is wholly insufficient as matter of law to establish in Rulon D. Hair a status of incompetency or of recklessness or carelessness.

(d) It is alleged and the evidence establishes the fact that Avenell Newby, at the time of the accident, was riding in said automobile as a gratuitous guest of Rulon D. Hair. The evidence fails to show that at the time of said accident the said Rulon D. Hair was guilty of violating the guest statute of the state of Idaho or that he was guilty of reckless disregard of the rights of Avenell Newby. The evidence further shows that at the time of said accident the said Avenell Newby was riding in said automobile in company with the said Rulon D. Hair at her request, and that she joined with the said Rulon D. Hair in any act or acts performed by him prior to the said accident and during the trip in which they were jointly engaged, and that preceding said accident she [78] was in a position to be as observant of surrounding conditions and of all acts or omissions on the part of the said Hair as was the said defendant, Rulon D. Hair; that she was conscious and could observe all of the acts of said defendant in the operation of said motor vehicle, but at no time made protest or objections of any act or acts regarding the operation of said vehicle, but acquiesced in the conduct of Rulon D. Hair, whatever the same might have been, in the operation of said automobile, and became, as a matter of law, as much liable for any act or omission of the driver of said car as the driver himself could have been, and thereby became, and her heirs now are, estopped from

asserting any dereliction of the said Rulon D. Hair as a basis for a claim for damages.

That in each and all of the particulars hereinbefore recited, said evidence is wholly insufficient in law to justify the verdict of the jury and the decision and is against the law governing and controlling such matters.

## II.

Excessive damages appearing to have been given under the influence of passion and prejudice for the reasons recited in Paragraph I hereof.

## III.

Errors in law occurring at the trial, more particularly as follows:

(a) Error of the Court in denying said defendants' motion to compel the plaintiffs to elect upon which of two inconsistent theories they intended to proceed upon the trial of said cause, that is, upon the alleged theory that Rulon D. Hair had a status as an incompetent or reckless driver, which was known to these defendants, or upon the theory that at the time of the accident the said Rulon D. Hair violated the guest statute of the state of Idaho, and was at said time acting within the scope of [79] his employment as an agent, servant or employee of L. R. Donnelly and/or R. J. Reynolds Tobacco Company.

(b) The Court erred in admitting in evidence any testimony touching the so-called Meyers incident, and particularly the testimony of F. H. Smullen, Ben Buskirk, and L. R. Donnelly, on cross-examination, and in refusing to strike all of said testimony and instructing the jury to completely



disregard the same, upon the ground that the same was highly prejudicial to the rights of these defendants, and failed to establish a status on the part of Rulon D. Hair as an incompetent driver.

(c) The Court erred in permitting the introduction in evidence of any testimony by the witness Sid Close pertaining to the so-called Dubois incident; that said testimony was highly prejudicial, and the striking of the same from the record did not cure said error.

(d) The Court erred in admitting in evidence plaintiffs' Exhibit number "22", the same purporting to be a certified copy of the Probate Court of Clark County, Idaho, reciting a plea of guilty to reckless driving by one B. R. Hair, residence: Soda Springs, Idaho.

(e) The Court erred in denying the defendants' motion for a directed verdict in favor of said defendants, for the reasons hereinbefore recited in the opening paragraph of this motion.

(f) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 5, to the effect that a high rate of speed, or even excessive speed, in driving an automobile is not in and of itself reckless disregard of the rights of a guest riding in said car.

(g) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 6 having to do with said defendants' written instructions to Rulon D. Hair for- [80] bidding him to carry a guest in said automobile.

(h) The Court erred in refusing to give to the jury and denying defendants' requested instruction

No. 7 touching the use of said automobile by Rulon D. Hair.

(i) The Court erred in refusing to give to the jury and denying said defendants' requested instruction No. 8 touching the use of said automobile at the time of said accident.

(j) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 9.

(k) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 10.

(l) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 12 dealing with the use of intoxicating liquor by a guest and driver.

(m) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 14, covering the failure of a guest to protest.

(n) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 15 covering and outlining what is necessary to establish the status of incompetency on the part of a driver, and further to the effect that one or two isolated acts cannot be considered as having such effect.

(o) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 16.

(p) The Court erred in refusing to give to the jury and denying defendants' requested instruction No. 17 advising the jury that they were to disregard any testimony given by Sid Close.

(q) The Court erred in refusing to give to the jury and denying defendants' requested instructions No. 21 and 22.

(r) The Court erred in giving to the jury those certain instruction to which said defendants excepted before the jury had retired, and all of them, and particularly those certain instructions as follows, to-wit: [81]

(1) "You are instructed, that while some evidence has been admitted as to defendant Rulon D. Hair having permitted other people to ride in his truck at various times, and as to a former accident in which defendant Rulon D. Hair was involved with a similar truck in Pocatello, Idaho, in the Spring of 1939, in which one Meyers was involved, and also evidence pertaining to the arrest plea of guilty of defendant Rulon D. Hair at Dubois, Idaho in 1939, for an alleged violation of a traffic law, you are instructed that you cannot consider any of said evidence received on either of said incidents as any evidence whatever supporting the charge against defendant Rulon D. Hair, in this action. This evidence was admitted as to defendant R. J. Reynolds Tobacco Company and L. R. Donnely as to their responsibility as covered in other instructions."

(2) "The Statute of Idaho make it unlawful for any person to drive any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, and it is further provided in the State Statute that any person driving a vehicle on a highway shall drive the same at

a careful and prudent speed not greater than is reasonable and *property*, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person and in that Statute it is provided that it shall be *prima facie* lawful for a driver of a vehicle to drive the same on a highway at a speed not exceeding thirty-five miles an hour, and it is further provided in the State Statute that it shall be *prima facie* unlawful for any person to exceed the speed of thirty-five miles an hour on a highway outside of municipalities.”

(3) “You are instructed that a servant may be presumed *prima facie* to be acting in the course of his employment, wherever it appears, not only that his master was the owner of the given instrumentality, but also that, at the time when the alleged injury occurred, it was being used under conditions which normally attended those used in connection with the master’s business.”

(4) “You are instructed that if you should find from the evidence that the said Rulon D. Hair had previously, to the 11th day of September 1942, disobeyed the instructions of his employer or employers and had permitted guests to ride with him in the truck or trucks furnished him by the R. J. Reynolds Tobacco Company for the purpose of selling their products and that such fact or facts were known to the R. J. Reynolds Tobacco Company or any of its authorized agents or if by the use of ordinary [82] “diligence and precaution such facts could have been known to the said R. J. Reynolds Tobacco



Company or any of its agents, then the said defendants in this case could not avail themselves of the defense that the said Rulon D. Hair was acting contrary to instructions and outside the scope of his authority in hauling a guest, or in not attending to company business."

(5) "You are instructed that as it is conceded by the R. J. Reynolds Tobacco Company, that the deceased Avenell Newby was riding in the panel truck of said Tobacco Company as a gratuitous passenger or guest of Hair, then the defendants are liable if the accident resulting in the death of Avenell Newby shall have been caused by the operation through his intoxication or his reckless disregard of the rights of others and if you find from a preponderance of the evidence that anyone of these things was the proximate cause of the death of Avenell Newby, then your verdict should be for the plaintiffs, if you find for the plaintiffs upon the other issues."

(6) "You are instructed that it is conceded that the panel truck belonged to the R. J. Reynolds Tobacco Company and the facts show that the accident occurred during ordinary business hours; that the accident also occurred in the territory or locality in which the said Rulon G. Hair was authorized to operate as a salesman for R. J. Reynolds Tobacco Company products and that the said panel truck belonging to the R. J. Reynolds Tobacco Company and driven by Rulon D. Hair at the time of the accident contained property and products of the R. J. Reynolds Tobacco Company, ordinarily carried for sale by the said Rulon D. Hair in said

Panel truck and you are instructed that you may take into consideration these facts and circumstances to assist you in determining whether or not the said Rulon D. Hair was at the time of the accident acting within the scope of his employment."

That the foregoing instructions and each of them are erroneous as applied to the facts in this particular case and are, and each of them is, against the law governing and controlling this cause, and that specific exceptions to each of said instructions were made prior to the time the jury retired and form part of the Reporter's notes of the proceedings of this cause, and reference is hereby made to said exceptions and the same are adopted herein with like effect as if the same were set out following each of the above quoted instructions. [83]

Said motion is based and will be made upon all the records, files, pleadings, and proceedings in said action, including the instructions given, and the instructions requested by the defendants and refused by the Court, and upon the minutes of the Court as stated and defined in Rule 50 of the Rules of Practice of this court, which embraces the Reporter's Transcript of his notes in said cause.

A. L. MERRILL,

R. D. MERRILL,

Residence: Pocatello, Idaho.

E. B. SMITH,

Residence: Boise, Idaho. Attorneys for said defendants R. J. Reynolds Tobacco Company and L. R. Donnelly.

(Service Acknowledged)

[Endorsed]: Filed Nov. 2, 1943. [84]



[Title of Court and Cause.]

PETITION OF RULON D. HAIR ON MOTION  
FOR JUDGMENT NOTWITHSTANDING  
VERDICT AND, IN THE ALTERNATIVE,  
FOR A NEW TRIAL

Comes now Rulon D. Hair, one of the above named defendants and moves the court to set aside the verdict and judgment entered thereon and enter judgment in his favor notwithstanding the verdict in accordance with the motion made by said defendant for a directed verdict at the close of the case, which motion was made by this defendant at the conclusion of all of the evidence.

And as this defendant's petition on motion for judgment notwithstanding the verdict and in the alternative for a new trial, this defendant hereby joins in and adopts the petition on motion for judgment notwithstanding verdict and in the alternative for new trial filed in the above entitled court and matter by the other defendants in said action; R. J. Reynolds and L. R. Donnelly, and hereby refers to the same as and for reference hereby adopts the same as if set forth at this point.

(a) That the evidence is wholly insufficient to support a verdict for the plaintiffs and against this defendant, more particularly because said evidence was wholly insufficient to show that Rulon D. Hair was a careless, reckless or incompetent driver.

(b) That the evidence failed to show that, at the time of said accident, the said Rulon D. Hair was in any way guilty of violating the gratuitous guest

statute of the state of Idaho or that he was guilty of reckless disregard of the rights of Avenell Newby. That at the time of said [85] accident and for some time prior thereto, the said Avenell Newby was riding in said automobile as a guest of Rulon D. Hair, and at her instance and request; that immediately prior to said accident she was in a position to be as observant of all surrounding conditions and of all acts or omissions, if any, on the part of the said Hair as was Hair himself; that she was conscious and could observe the acts of the defendant in the operation of said automobile, but that she made no protests or objections to anything done or omitted by the said Rulon D. Hair, but acquiesced in his conduct and in the operation of said automobile.

(c) That the evidence introduced of a former incident of defendant resulting in his arrest at Duboise, Idaho, and a former incident of an accident at Pocatello, Idaho, involving one Myers and the defendant, both of which occurred more than three years prior to the accident referred to in this suit were introduced and admitted for the purpose of showing Rulon D. Hair to be a careless, reckless or incompetent driver was wholly and completely incompetent, irrelevant, and immaterial, and insufficient as matter of law to establish the status of incompetency or carelessness or recklessness on the part of said Rulon D. Hair, and was highly prejudicial to this defendant and should have been excluded from the jury.

Said defendant refers to his motion as made in open court and as the same appears in the notes of the Reporter for full particulars.

In the event of a failure of the court to grant said motion for judgment notwithstanding the verdict, then this defendant moves for an order setting aside the verdict and judgment rendered herein and granting a new trial pursuant to Rule 50 of the Rules of Federal Procedure, and the Rules of this court, upon the following grounds:

For the grounds of this motion this defendant hereby refers to and by reference adopts as fully as if set forth at this point all of paragraphs one, two, and three of the grounds of insufficiency of the evidence to justify the decision or verdict, and that the same is against the law set forth in the said motion filed by defendants, Reynolds Tobacco Company and L. R. Donnelly, filed in the above entitled court and made with the same effect as if the same were accompanying in full at this point.

Said motion is based upon and will be made upon all of the [86] records filings and pleading and proceedings in said action, including instructions given and the instructions requested by defendants and refused by the court, and upon minutes of the court as stated and defined by Rule 50 of the Rules of

Procedure of this court which embraces the Reporter's Transcript of his notes in said case.

ROY BLACK,

JOHN R. BLACK,

Residing at Pocatello, Idaho,

Attorneys for defendant,

Rulon D. Hair.

(Service Acknowledged)

[Endorsed]: Filed Nov. 2, 1943. [87]

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[Title of Court and Cause.]

## MINUTES OF THE COURT

January 5, 1944

This cause came on for hearing at this time, upon agreement of counsel for all parties to the action, on the Motions for judgment notwithstanding verdict, and, in the alternative, for a new trial.

The defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, were represented by E. B. Smith, Esquire, who made oral argument on behalf of said defendants. The defendant Rulon D. Hair appeared by letter of his counsel, Messrs. Black and Black; and the plaintiff's counsel presented the plaintiff's resistance to said motions on brief.

The Court, being fully advised in the premises, announced his conclusions, and ordered that both Motions for judgment regardless of verdict and Motions for new trial be, and the same hereby are, denied. All defendants were granted exceptions to the Order. [88]

[Title of Court and Cause.]

NOTICE OF APPEAL BY R. J. REYNOLDS  
TOBACCO COMPANY AND L. R. DON-  
NELLY.

Notice Is Hereby Given That R. J. Reynolds Tobacco Company, a corporation, and L. R. Donnelly, two of the defendants above named, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from that certain final judgment made and entered in the above entitled court and cause on the 23rd day of October, 1943, which said judgment is in favor of the plaintiffs above named and against these two appealing defendants, and each of them; also against one Rulon D. Hair.

Dated this 20th day of January, 1944.

E. B. SMITH,

Residence: Boise, Idaho,

A. L. MERRILL,

R. D. MERRILL,

Residing at Pocatello, Idaho,

Attorneys for said defendants,

R. J. Reynolds Tobacco  
Company and L. R. Donnelly.

[Endorsed]: Filed Jan. 20, 1944. [89]



[Title of Court and Cause.]

**COST BOND ON APPEAL OF R. J. REYNOLDS  
TOBACCO COMPANY AND L. R. DON-  
NELLY**

Know All Men By These Presents:

That we, R. J. Reynolds Tobacco Company, a corporation, and L. R. Donnelly, as Principals, and United States Fidelity and Guaranty Company, a corporation organized under the laws of the State of Maryland and authorized to transact the business of acting as sole surety upon bonds and undertakings in the State of Idaho, as Surety, are held and firmly bound unto George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their guardian ad litem, George H. Newby, the above named plaintiffs and appellees in the above entitled cause, in the sum of Two Hundred Fifty (\$250.00) Dollars, for which sum well and truly to be paid we bind ourselves and our and each of our successors and assigns, jointly and severally, firmly by these presents.

Sealed with out seals and dated this 20th day of January, 1944.

Whereas, on the 23rd day of October, 1943, in the District Court of the United States for the District of Idaho, Eastern Division, in a suit pending in that Court wherein George H. Newby, in his own behalf, Richard Arlen Newby and [90] Patty Ann Newby, both minors, by their guardian ad litem, George H. Newby, were plaintiffs, and R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon



D. Hair were defendants, a judgment was rendered against said defendants in the sum of \$7,500.00, with interest and costs, and said defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, having filed in the office of the Clerk of said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit:

Now, Therefore, the condition of this obligation is such, that if the said R. J. Reynolds Tobacco Company and L. R. Donnelly, the appellants, shall prosecute said appeal and pay all costs that may be rendered against them or either of them if the appeal is dismissed or the judgment affirmed, or such costs as the appellate court may award against these defendants or ether of them if the judgment be modified, then the above obligation is void, otherwise to remain in full force and effect.

R. J. REYNOLDS TOBACCO  
COMPANY,

By E. B. SMITH,

One of its attorneys of record,  
Residing at Boise, Idaho,

L. R. DONNELLY,

By E. B. SMITH,

One of his attorneys of record,  
Residing at Boise, Idaho,  
Principal.

UNITED STATES FIDELITY  
AND GUARANTY COMPANY  
By HENRY WHITSON,

Its attorney in fact,  
Surety.

[Seal] HENRY WHITSON,  
Resident Agent,  
Residing at Boise, Idaho.

[Endorsed]: Filed Jan. 20, 1944. [91]

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[Title of Court and Cause.]

PETITION FOR APPROVAL OF SUPER-  
SEDEAS AND STAY ON APPEAL

Come now R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the above named defendants and appellants, and represent as follows:

That Judgment was entered in the above entitled court and cause on the 23rd day of October, 1943, in favor of George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their Guardian Ad Litem, George H. Newby, the above named plaintiffs, and against R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair, as defendants, for the sum of Seven Thousand Five Hundred (\$7,500.00) Dollars, with interest thereon at 6% per annum from the 23rd day of October, 1943, and costs taxed at \$89.40 Dollars; that R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the above named defendants,

have appealed from said Judgment to the United States Circuit Court for the Ninth Circuit, and desire the Court to fix the amount of a supersedeas bond for them and each of them, approve the form thereof, and also approve the Maryland Casualty Company, a corporation, as Surety, and thereupon order a stay of proceedings as against these two appellants, according to law.

Now, therefore, Petitioners pray that the Court fix the [92] amount of said supersedeas bond, approve the form of the bond tendered herewith, and the Surety thereon, and order a stay according to law.

Dated this 20th day of January, 1944.

E. B. SMITH,

Residing at Boise, Idaho,

A. L. MERRILL,

R. D. MERRILL,

Residing at Pocatello, Idaho,

Attorneys for said defendants.

[Endorsed]: Filed Jan. 20, 1944. [93]

[Title of Court and Cause.]

ORDER APPROVING BOND AND GRANTING  
STAY OF EXECUTION AGAINST R. J.  
REYNOLDS TOBACCO COMPANY AND  
L. R. DONNELLY

The defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, having this day filed their Notice of Appeal from the Judgment rendered in the above entitled cause in favor of the plaintiffs, George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their Guardian Ad Litem, George H. Newby, and against the defendants, R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair, to the United States Circuit Court of Appeals for the Ninth Circuit, and having filed their petition for an order fixing the amount of the supersedeas bond so far as they are concerned, and approving the proposed surety, and the form of said bond and granting a stay of proceedings;

Now, Therefore, it is hereby ordered that the amount of said Supersedeas Bond be fixed in the sum of Nine Thousand (\$9,000.00) Dollars, and the bond tendered by the said R. J. Reynolds Tobacco Company and L. R. Donnelly in said sum with Maryland Casualty Company, a corporation, as surety, be and the same is hereby in all respects approved, and that all proceedings herein for the collection of said judgment against R. J. Reynolds

Tobacco Company and L. R. Donnelly be and they are hereby stayed [94] according to law.

Dated this 20th day of January, 1944.

CHASE A. CLARK,

District Judge.

[Endorsed]: Filed January 20, 1944. [95]

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[Title of Court and Cause.]

### TRANSCRIPT OF TESTIMONY

This matter was tried before the Honorable Chase A. Clark, United States District Judge, for the District of Idaho, sitting with a jury, at Pocatello, Idaho, on October 20, 1943.

### APPEARANCES

Glen A. Coughlin, Montpelier, Idaho,

Ben W. Davis, Pocatello, Idaho,

Attorneys for the Plaintiffs,

Messrs. Merrill & Merrill, Pocatello, Idaho,

E. B. Smith, Boise, Idaho,

Attorneys for the defendants, Reynolds Tobacco Company and L. R. Donnelly.

Messrs. Black & Black, Pocatello, Idaho,

Attorneys for the defendant Rulon D. Hair.

[96]



October 20, 1943

2 o'clock P. M.

(Jury selected and sworn to try the cause.)

Mr. Smith: We have made a motion to require the plaintiff to elect and also a motion to strike portions of the complaint not tending to support the theory not elected by the plaintiffs. Our motion is to the effect that the Court require the plaintiff to elect upon which theory they intend to rely, upon the claimed negligence of the defendants Tobacco Company and L. R. Donnelly in permitting Rulon D. Hair to use and operate the Chevrolet Panel truck. Paragraph seven of the complaint is to the effect that Hair had permission of L. R. Donnelly to use the automobile on the highways of Idaho, notwithstanding that at all of the said times the said Tobacco Company and Donnelly knew that Hair was a careless and reckless and incompetent driver of an automobile. The second part of our motion is whether or not they intend to rely on the theory that Avenell Newby was a guest with Mr. Hair at the time of the accident as alleged in paragraph eight of the complaint and thereby making an attempt to recover under the so called Idaho Guest Statute, the two theories being diametrically opposed.

The Court: I had this matter [99] under consideration to a great extent at the time I permitted the amendment to the complaint. I want to call your attention to rule 18: "The plaintiff in his complaint or in a reply setting forth a counterclaim



and the defendant in an answer setting forth a counterclaim may join either as independent or as alternate claims as many claims either legal or equitable or both as he may have against an opposing party." In the face of that rule it seems to me that they would have a right to do the very thing you are arguing against.

Mr. Smith: It occurs to me that the rule has in mind two different claims arising out of different transactions. There is only one basic claim from which damages could flow, it was the accident.

The Court: I am of the opinion that the rule is broad enough to cover this situation, otherwise I would not have permitted the amendment to the complaint, bringing in what I considered a new and separate cause of action. If you have any authorities that you want to present on this matter I would be glad to have them. I am not taking snap judgment on this because I have thought a good deal about it, I have given the matter considerable attention.

Mr. Merrill: It seems to us that [100] as Mr. Smith argued, that rule goes to the cases where they have different claims and would attempt to secure a verdict on each claim and not a case where they are attempting to allege different actions or counts for the same claim,—

The Court: —I want counsel to have an opportunity to fully present this but it seems to me the rule is intended to give a party, in a single action, all of the relief to which he is entitled. If a person had two grounds of recovery there would be no way of placing these grounds before the jury

except in separate actions. I am inclined to feel under the rule that the plaintiff should not be required to elect. The motion is overruled and you may have your exception.

Mr. Black: May we have an exception to the ruling also?

The Court: Yes, you may have an exception. Now, you may make your opening statement.

(Opening statement by Mr. Davis.)

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### MIKE McGUIRE

being called as a witness on the part of the plaintiff after being first duly sworn testifies as follows:  
being called as a witness on the part of the plaintiff,

#### Direct Examination

By Mr. Coughlin: [101]

Q. State your name? A. Mike McGuire.

Q. Where do you reside?

A. At Pocatello, at the present time.

Q. What is your occupation?

A. Assistant Roadmaster for the Union Pacific Railroad.

Q. How long have you worked for the Union Pacific Railroad Company? A. Eight years.

Q. You said eight years. A. Yes sir.

Q. Were you traveling between Soda Springs, Idaho, and Montpelier, Idaho, on the afternoon of September 11, 1942? A. Yes sir.

Q. Which direction were you going?

A. I was going south, toward Montpelier.

(Testimony of Mike McGuire.)

Q. Do you know Mr. Rulon D. Hair?

A. Not personally acquainted with him, but I know him if I see him.

Q. Is he in the Court room now?

A. Yes sir.

Q. Can you point him out?

A. He is the fourth man from the end there (indicating).

Q. Did a Camel cigarette truck pass you on the road between Soda Springs and Montpelier, that day? [102]

A. Yes sir.

Mr. Merrill: Objected to as leading.

The Court: It is leading but the answer may stand.

Q. Who was driving this truck?

Mr. Merrill: Objected to as calling for a conclusion.

Mr. Coughlin: Withdraw the question.

Q. Do you know who was driving the truck at the time he passed you?

A. At the time he passed me I didn't, but after I picked them up.

Q. Do you know now who was driving the truck?

A. Yes sir, I do.

Q. Who was driving that truck?

A. Mr. Hair.

Q. This defendant (indicating)?

A. Yes.

Q. Which direction was it going.

A. South.

Q. The same direction you were going?

A. Yes sir.

(Testimony of Mike McGuire.)

Q. When did you first notice this truck?

A. Well, as I was going down the highway I noticed it as it went around me.

Q. What called your attention to the fact that the truck was [103] there?

A. What called my attention to it was that he started honking and then he went around me.

Q. Did he honk the horn after he passed you?

A. Yes sir.

Q. And as he went around you?

A. Yes sir.

Q. And how long before,—did he honk it before he went around you, Mr. McGuire?

A. Yes sir.

Q. How fast were you going as the truck passed you?      A. About thirty-five.

Q. You mean thirty-five miles an hour?

A. Yes sir.

Q. Do you know what kind of an automobile this was?

A. I know it was a little panel truck, I don't know the make of the car.

Q. Were there any signs on the truck?

A. Yes sir.

Q. What were they?

A. Prince Albert sign on the side of the truck and a package of cigarettes painted on the door.

Q. How long have you driven an automobile Mr. McGuire?      A. Around ten years.

Q. Are you acquainted with the speed of automobiles?      A. Yes, I think so. [104]

(Testimony of Mike McGuire.)

Q. Have you had occasion to judge the speed of automobiles?      A. Not automobiles.

Q. Well, of any vehicles?

A. Only the speed that we have on the railroad.

Q. In your opinion, Mr. McGuire, how fast was the truck going at the time it passed you on that day, on the highway between Soda Springs and Montpelier, Idaho?

Mr. Merrill: Object to that question as calling for a conclusion of the witness, and no proper foundation has been laid and it is immaterial as to the point where it passed him.

The Court: He may answer.

A. In my opinion it would be around sixty miles an hour.

Q. About how long was it from the time that the truck passed you until you next saw it?

A. It is kind of hard to answer that question.

Mr. Merrill: If he says he cannot answer, we object to further question on that as being speculative.

Mr. Coughlin: Very well.

Q. Mr. McGuire, about where were you when the truck passed you on the road, that is, with relation to the road from Soda Springs to Montpelier?

A. I was between a quarter and a half mile south of the overpass, just south of Soda Springs.

Q. How far was it from this point until you next saw the truck? [105]

A. I would say between eight and ten miles.



(Testimony of Mike McGuire.)

Q. Are you able to say how long it took you to go that distance?

Mr. Merrill: Objected to as not being material and no foundation is laid.

The Court: He may answer.

A. It could be around twenty-five or thirty minutes.

Q. Now, Mr. McGuire, just tell the jury how you next happened to see that truck?

A. Well, after it passed me I continued on down the road until I came to the place where I heard a horn honking and I looked in the mirror and couldn't see anything in it, and as I came up on it I saw this truck upside down over in the borrow-pit.

Q. What did you do?

A. I stopped and went down to see if there was anybody in it.

Q. You went to see if there was anyone in the truck? A. Yes sir.

Q. Was there anyone in it? A. Yes sir.

Q. Who was in the truck?

A. There was a woman in the truck and just as I got there Mr. Hair came around from the other side of it.

Q. Was the woman still inside the automobile?

A. Yes sir.

Q. Did Mr. Hair make any statement to you with reference to the cause of the accident? [106]

A. Yes sir.

Q. What did he say?



(Testimony of Mike McGuire.)

A. He said he just was drinking and driving too fast.

Q. What did you do then?

A. We took her out of the car and put her in mine and took her to Montpelier, to the hospital.

Q. You mean by "her" the woman who was in the truck?      A. Yes sir.

Q. Did you notice any marks on the highway made by the truck before it tipped over?

A. After I stopped I looked back down the highway and I seen the last track where he swerved across the highway, I didn't pay much attention to it, but I do remember the track there.

Q. What was the condition of the truck?

A. The top was caved in. I didn't pay any particular attention to it only that the top was smashed in. It was upside down.

Q. Did you notice any merchandise there at the scene of the accident?      A. Yes sir.

Q. Where was that?

A. That was scattered all over the ground, around the truck there.

Q. Do you know what kind of merchandise it was?

A. It was chewing tobacco and cigarettes. [107]

Q. Do you know what kind of cigarettes?

A. I didn't pay much attention to the brand.

Q. Between the time that the truck passed you and the time you came upon the scene of the accident, did you see or pass any truck or semi-trailer?

A. No.

(Testimony of Mike McGuire.)

Mr. Merrill: We object to that as leading, and we move the answer be stricken for the purpose of the objection?

The Court: I will overrule the objection. The answer may stand in the record.

Q. Did you meet any vehicle of any kind after the time the truck passed you and before the time you came upon the scene of the accident?

A. No sir.

Mr. Coughlin: You may examine.

#### Cross Examination

By Mr. Black:

Q. You had been down to Soda Springs?

A. Yes sir.

Q. Is that where you came from that afternoon?

A. No sir, I came from Bancroft.

Q. Did you stop at Soda Springs?

A. Yes sir.

Q. You were going from Soda Springs when you approached the scene of this accident? [108]

A. Yes sir.

Q. This truck passed you when you were about a quarter of a mile beyond the overpass?

A. Yes sir.

Q. How far is the overpass from Soda Springs?

A. I don't know.

Q. Are you familiar with that road?

A. Not too familiar.

Q. How often have you been over that road?

A. Two or three times.

(Testimony of Mike McGuire.)

Q. Including this time you speak of?

A. Up to that day.

Q. How much have you driven automobiles?

A. I have driven automobiles quite a bit.

Q. Did you own—strike that please,—do you have one now?

A. Yes sir.

Q. Have you driven a truck such as the defendant was driving on that day?

A. No.

Q. You don't attempt to state to the jury accurately how fast that truck was going when it passed you?

A. No sir, not accurately.

Q. If you were going thirty-five miles an hour and a car passed you, just while it was passing you wouldn't it have to go faster than you were going?

A. Yes sir. [109]

Q. And that is the time you refer to when you say it was going at a high rate of speed?

A. Yes sir.

Q. After this car passed you, you didn't see it again until you came upon the truck where the accident had occurred?

A. No sir, I didn't.

Q. You didn't see it between those times?

A. No sir.

Q. After this truck passed you, the next time you saw it was when it was turned upside down by the side of the road?

A. Yes that is right.

Q. Had it been raining that day?

A. Yes sir, it has been.

Q. And it was raining while you were driving from Soda Springs that day?

A. Yes sir.

(Testimony of Mike McGuire.)

Q. Do you know the condition of the road, along the side of the pavement? A. No sir.

Q. What kind of a roadbed was it between Soda Springs and where this accident occurred?

A. Black asphalt road.

Q. Paved in the center? A. Yes sir.

Q. Do you know how wide the pavement is there? A. No sir. [110]

Q. Is there a yellow or white line to mark the middle of the road where this accident occurred?

A. Not that I seen.

Q. You didn't observe it? A. No sir.

Q. You say your attention was called to the truck off the road by the horn sounding?

A. Yes sir.

Q. It was sounding while the truck was in that position, that is, while the truck was upside down?

A. Yes sir.

Q. What did you do with reference to stopping?

A. I just drove up and stopped at the accident.

Q. Stopped in the highway opposite where the truck was? A. Yes sir.

Q. Was there any borrow pit along there?

A. Not a deep one.

Q. There was a pit?

A. Yes, I guess there was, but not a deep one.

Q. How deep was it?

A. I cannot say just how deep it was.

Q. Do you know how wide it was?

A. No sir.

(Testimony of Mike McGuire.)

Q. Do you know how wide the shoulder on the highway was at the place of the accident?

A. No sir. [111]

Q. You personally didn't make any examination to see how this accident occurred, by examining any marks, making any measurements or anything of that kind?

A. No sir.

Q. When you got there you saw Mr. Hair coming out of the car?

A. No sir.

Q. Did you see him get out or was he out?

A. I never saw him get out of the car, but as I walked up he came around from the other side of the car.

Q. Did he say anything to you about someone being in the car?

A. Yes, he did.

Q. What did you do then?

A. We started to get the woman out of the car.

Q. He kept at that until he got this lady out of the car?

A. Yes sir, he did.

Q. You and him put the lady in your car?

A. Yes sir.

Q. And took her to the hospital at Montpelier?

A. Yes sir.

Q. Now Mr. McGuire where was it that Mr. Hair made the statement to you about the cause of the accident?

A. After we laid her in the car and started to Montpelier.

Q. You say that he made some statement to you?

A. Yes sir.



(Testimony of Mike McGuire.)

Q. Did he at that time tell you anything about what had happened in the highway? [112]

A. No sir.

Q. He didn't tell you about anything that happened to his tires, or to the tires of his car?

A. No sir.

Q. Or about going off the pavement?

A. No sir.

Q. So that the only statement you say he made was the statement he made about this accident?

A. Yes sir.

Q. You made no personal examination yourself.

A. No sir.

Q. Now, Mr. McGuire, do you have in mind, any judgment at this time, as to how far it was,—how many miles it was from the place this truck passed you to the place where you found the truck again?

A. I would just make the guess that it was between eight and ten miles.

Q. Might have been farther and might have been less?

A. May have been further and may have been less.

Q. You don't remember of meeting any semi-trailer truck? A. No sir.

Q. Do you mind telling us how fast,—strike that,—Mr. McGuire let me ask you, do you mean to tell this jury that in driving down the highway without any interest in what cars passed you, that you could be sure that you didn't pass another car or truck? [113] A. Yes sir.

(Testimony of Mike McGuire.)

Q. You could be sure of that? A. Yes sir.

Q. Did you meet any cars on this day before you got to Soda Springs, between Bancroft and Soda Springs? A. Several cars.

Q. Nothing unusual about meeting a car or semi-trailer on the road? A. No sir.

Q. Did you notice whether Mr. Hair himself was injured? A. No sir.

Q. Did you notice his head, where it was bleeding or anything of that kind?

A. He wasn't bleeding too much, maybe a little scratch on his forehead that I remember.

Q. You do remember some marks on him?

A. Yes sir.

Q. You didn't ask him how much he was hurt?

A. No sir.

Q. Or whether he was hurt? A. No sir.

Q. You had no conversation about that?

A. No sir.

Mr. Black: You may inquire.

#### Cross Examination

By Mr. Merrill: [114]

Q. Mr. McGuire, you have passed other cars on the highway? A. Yes, lots.

Q. You speed up when you do pass?

A. Yes, if I am going the same way.

Q. It isn't unusual for a passing car to speed faster than the one it is passing? A. No sir.

Q. And it is not unusual for a passing car to sound the horn, is it? A. In some cases.

Q. They frequently do that? A. Yes sir.

(Testimony of Mike McGuire.)

Q. Mr. Hair did that? A. Yes sir.

Q. He passed you and did that?

A. Yes sir.

Q. Were you watching your speedometer at that time?

A. I looked at it just before he passed me.

Q. You looked just before? A. Yes sir.

Q. It was just over the overpass?

A. About a half a mile.

Q. And it is just outside of the city limits?

A. I cannot say, but I know it is not too far.

Q. How far would you say it was,—a quarter of a mile?

A. I wouldn't say. I am not familiar enough with that. [115]

Q. How many miles from Soda Springs was this accident? A. I couldn't tell you.

Q. Is the road straight from Soda Springs to where this accident happened? A. No sir.

Q. It winds around quite a bit?

A. Yes sir.

Q. Market roads, and country roads intersect the highway along that stretch? A. Yes sir.

Q. Several between Soda Springs and where it passed you? A. Yes sir.

Q. Would you recognize a picture of the car if you saw it? A. Yes sir.

Q. You are handed what has been marked as defendant Tobacco Company's exhibit 1, I will ask you if you recognize that to be a picture of that car after the accident?

(Testimony of Mike McGuire.)

A. The way it is facing me I couldn't tell.

Q. Did you notice the license on the car?

A. No sir.

Q. You didn't notice that? A. No.

Q. Did you notice whether or not the right front tire had been blown out? A. No sir.

Q. You didn't pay any attention to that? [116]

A. No sir.

Q. Didn't make any observations?

A. No sir.

Q. Then you don't know whether this is the car or not? A. No sir.

Q. We are *no* handing you what has been marked defendant Tobacco Company's exhibit 2, do you recognize that as a photograph of the highway? A. Yes sir.

Q. That looks like the markings on the highway which you saw? A. That looks like it.

Q. Would you say that is a fair representation of the markings on the highway? A. Yes sir.

Mr. Merrill: We offer in evidence defendant Tobacco Company's exhibit 2.

Mr. Davis: No objection.

The Court: It may be admitted.

Q. Now, Mr. McGuire, your work is with the Railroad Company? A. Yes sir.

Q. Your attention to speed is directed to the speed of trains? A. Yes sir.

Q. You have never had any particular experience with automobile speed, or made any study in judging speeds of automobiles? [117]

A. No sir.

(Testimony of Mike McGuire.)

Q. What kind of car were you driving?

A. Pontiac, 1938, four door sedan.

Q. How many cylinders? A. Six.

Q. Six cylinder Pontiac? A. Yes sir.

Q. You don't profess to be a judge of the speed of automobiles? A. No sir.

Mr. Merrill: That is all.

### Redirect Examination

By Mr. Coughlin:

Q. Is the road straight there where the accident happened? A. I wouldn't be sure.

Q. Did you have any difficulty in getting the lady out of the car?

Mr. Merrill: We object to that it is immaterial and improper cross,—improper redirect examination.

The Court: The objection is sustained, I don't think it is material.

Q. Mr. McGuire, was there anything unusual about the sounding of this horn at the time the car passed you? A. Yes sir.

Q. What was that?

A. What called my attention to it was that they started [118] honking so far behind me and kept honking so far after they went by.

Q. What were you particularly interested in at the time you came upon the scene of the accident?

Mr. Merrill: Objected to as immaterial.

The Court: He may answer.

A. To see if there was anybody in it.



(Testimony of Mike McGuire.)

Q. You mean to see if there was anyone in the car?      A. Yes.

Q. Anything else?      A. That was all.

Q. And after that, what were you interested in?

A. Getting the woman out and to the hospital.

Q. Is that the reason you didn't make any particular observation?      A. Yes sir.

Q. With reference to that exhibit 2, does that show the entire road at the scene of the accident and all the markings?

Mr. Merrill: Object to that it is obviously immaterial, it is also leading. The picture shows for itself. Obviously there is more of the road on both ends.

The Court: He may answer as to what he knows.

A. I would not be sure, I didn't examine it close enough. [119]

Q. Which hospital did you take Mrs. Newby to?

A. You got me there, I cannot remember the name of it.

Q. Do you know the Doctor's name who attended her?      A. Yes sir.

Q. Who was that?      A. Doctor Lindsey.

Mr. Coughlin: That is all.

#### Recross Examination

By Mr. Merrill:

Q. You say that the horn was honking when you came up to the car on the highway?

A. Yes sir.

Q. It was caught?      A. Yes sir.

(Testimony of Mike McGuire.)

Q. You have experienced horns of automobiles catching before have you not?      A. Yes sir.

Q. Did you lift this lady out of the car?

A. Mr. Hair and I.

Q. Did you smell any liquor on her breath.

A. I wouldn't say yes, I wasn't interested.

Q. You wouldn't say no.

A. No, I wasn't interested.

Mr. Merrill: That is all.

Mr. Coughlin: That's all.

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A. P. BUNDERSON [120]

called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Coughlin:

Mr. Merrill: We move at this time that there be stricken from the evidence and the jury instructed to disregard that statement of the witness that when the car passed him it was going around sixty miles an hour for the reason that he further testified that it was eight or ten miles before he came upon this car and he further testified that it was between twenty-five and thirty minutes before he reached this point. Obviously that testimony as to the speed and the time it took him to get to the car, twenty-five or thirty minutes and the testimony as to the distance of eight to ten miles does not have any bearing on any issue in this matter.

(Testimony of A. P. Bunderson.)

The Court: The jury will give the testimony what weight it is entitled to receive, I think the motion will be denied.

Mr. Merrill: Exception.

The Court: Yes, exception is granted, of course.

Q. Now, will you state your name?

A. Alton P. Bunderson.

Q. Where do you reside? [121]

A. Paris, Idaho.

Q. What is your occupation?

A. Sheriff of Bear Lake County.

Q. How long have you been Sheriff?

A. I am on my third year.

Q. What was your occupation immediately prior to this position?      A. State police.

Q. How long did you hold that position?

A. Two years.

Q. In your work both as Sheriff and as State Patrolman you have had occasion to investigate many accidents?      A. Yes sir.

Q. Have you attended police schools and traffic schools?

Mr. Merrill: Objected to as leading.

The Court: Yes, I think it is leading but now that the question is asked, I guess he may answer.

A. I would say police schools.

Q. Did you have occasion to investigate an automobile accident on September 11, 1942 which happened about twenty miles north of Montpelier on highway U. S. Number 30?      A. Yes sir.

(Testimony of A. P. Bunderson.)

Q. At what time were you first called to this accident?

A. About five-fifteen or five-twenty.

Q. That was the first call. [122]

A. Yes sir.

Q. What time did you arrive at the scene of the accident? A. I don't know.

Q. Could you say approximately?

Mr. Merrill: We object to that on the ground that he has answered the question.

The Court: The question now asked is approximately. He may answer.

A. Approximately a quarter to six.

Q. Did you make a thorough and complete investigation of the accident?

Mr. Merrill: Objected to as calling for a conclusion of the witness. The most he could do is state what he did.

The Court: Sustained.

Q. What did you do Mr. Bunderson upon arriving at the scene of the accident?

A. Started my investigation.

Q. What then did you do? What was the first thing you did?

A. I looked the wreck over and found nobody around it, and then I immediately started to make my measurements on the highway.

Q. Did you note any tracks leading up to the scene of the accident?

Mr. Merrill: Objected to as leading. [123]

The Court: Yes, I think the witness can tell the

(Testimony of A. P. Bunderson.)

result of his investigation without counsel leading him.

Q. Very well, will you just tell the jury what you did from the time you got to the scene of the accident and what you found and the result of your measurements?

A. After I arrived at the accident I looked the automobile over, and then I walked up the road leading from the wreck. The pavement was dry at the time I got there but the sides of the road were wet. I walked back up until I could see where the tracks had taken off the oiled highway. I took a measurement from that point, all of the measurements were measured by a steel *tape*. We found that the car left the oiled highway on the west side of the road, the tracks left the oiled road and stayed off the oil for 117 feet to the west; the tracks then came back on the oil and went across the 177 feet before they left the east side of the road. They stayed off the oil on the east side until they came back on 166 feet farther. That put them back on the oil again and the tracks led west across the oil again for 146 feet to where they took off the oil and stayed off the oil for 66 feet and then they went east again across the oil 92 feet and from there it went into the borrowpit and up on the east side of the borrowpit.

Q. How many feet was it from the side of the oil,—the east [124] side of the oil mat to the point where the automobile stopped?

A. Eighty-two feet.



(Testimony of A. P. Bunderson.)

Q. In what position was the automobile setting?

A. It was on its back with the wheels in the air, facing the northwest.

Q. You say the automobile was turned over?

A. Yes sir.

Q. Could you tell which way it turned, on the side or on the top?

A. It looked to me like it turned half end-ways and half side-ways.

Q. Did you see any rocks on either side of the road?

Mr. Merrill: Objected to as leading.

The Court: I will let him answer, but the question is somewhat leading.

A. No sir.

Q. What else did you do then?

A. After I *make* all the required measurements I summoned the wrecker. I had stayed there and watched the cargo until the wrecker came.

Q. Did you see any merchandise?

A. Yes sir.

Mr. Merrill: Objected to as immaterial and leading.

The Court: Overruled. [125]

Mr. Merrill: We think we will object to the witness reading from a memorandum unless he shows it to counsel for the other side.

The Court: Does counsel wish to see this memorandum?

Mr. Davis: Certainly we have no objection to that.

(Testimony of A. P. Bunderson.)

Q. Were you using this memorandum in regard to the wreck?

The Court: I think he may answer the former question by a yes or no answer.

A. Yes sir.

Q. And what was that merchandise?

A. Several cartons of camel cigarettes.

Q. What was done with this merchandise?

A. This merchandise was covered up and when the wrecker came it was all thrown in,—there could have been some of it thrown in the wrecker, but most of it was thrown in the back of the tobacco truck and the door was wired shut. The door was bent.

Q. Did you make any sketch of the scene,—any sketch or plat of it at that time? A. Yes sir.

Q. Do you have that plat with you?

A. Yes sir.

Q. Is the plat drawn to scale?

A. No sir. [126]

Q. Does it represent the true facts at the scene of the accident? A. Yes sir,—

Mr. Merrill: May that answer be stricken for an objection?

The Court: Yes it may be stricken.

Mr. Merrill: We object to that as calling for a conclusion of the witness, it is incompetent and no proper foundation is laid. He has testified already that it didn't, that it wasn't drawn to scale.

The Court: He may testify as to whether it represents the facts as he found them.

(Testimony of A. P. Bunderson.)

Q. I will ask you if it represents the facts as you found them there?

Mr. Coughlin: I think I should like to offer this as Plaintiff's exhibit 3.

Mr. Merrill: We object, it has data in handwriting that would be immaterial and is not proper on any map or chart. With such markings it would be incompetent, irrelevant and immaterial, we also object to all of that which is on the other side of the exhibit, it is prejudicial.

The Court: It seems there are some other matters on this report that have not been testified to in connection with license numbers and some other matters. The objection will be sustained at this time. [127]

The Court: At this time we will recess until tomorrow morning at 10. (Admonition to the jury.)

October 21, 1942

Q. Now, Mr. Bunderson, calling your attention to the other papers that were attached to the exhibit yesterday, did you use those papers in your testimony? A. No sir.

Q. I call your attention to the writing on the exhibit, you will explain that please?

A. They were notes that I took at the scene of the accident.

Q. In whose handwriting are they?

A. Mine.

Q. Where has this exhibit been kept since you made it? A. In the safe in my office.

(Testimony of A. P. Bunderson.)

Q. Where is that?

A. At the County seat, Paris.

Q. How does the sketch happen to be on the paper or card?

A. At the time I got to the scene of the accident I didn't have any other paper upon which to make the exhibit.

Mr. Merrill: We will object to it on the ground that it contains on the face and on the back matters not pertinent to the matter investigated here, and prejudicial. It is also incompetent, irrelevant and immaterial.

Mr. Black: We join in this [128] objection.

The Court: I think the notes should be explained as to whether they have anything to do with the matter before the Court. Sustained.

Q. Will you explain these notes and tell what they are.

A. Yes. The notes on here are the figures that I took, or rather they are figures of the measurements I took at the scene of the accident.

Q. Do they all pertain to the accident?

Mr. Merrill: We object to that explanation, in that it is not necessary in the sketch. It would be just as competent to permit him to go to the scene and write it up.

The Court: He should explain whether they apply to any matter here. For instance on this sketch there is a car license, I think it should be explained as to what the car license is. The objection will be sustained at this time.

(Testimony of A. P. Bunderson.)

Mr. Coughlin: May I approach the witness and point out these items?

The Court: Yes, you may.

Q. Now, I notice the figures 238 followed by the words "Steps", kindly explain that?

A. That indicates the measurements of the tracks. I walked back toward the car and I counted the steps up the middle of the road that I took from the time the car first left [129] the oil until it last left the oil.

Q. And the figures 6-40 explain that?

A. That is the time my investigation was completed.

Q. On that accident? A. Yes sir.

Q. License 3A 150 C, will you explain that?

A. That was the license number of the car.

Q. The wrecked car? A. Yes sir.

Q. 1941 Chevrolet, what does that mean?

A. That is the make and year of the car.

Q. This notation here "all done with the investigation", what does that refer to, and the figures 9-11-42? A. The date of the accident.

Q. And this notation "twenty miles north of Montpelier", will you explain that?

A. That was the estimated distance that I figured it was from Montpelier.

Q. The figures 769 and 82 for a total of 851?

A. That was the figures I used in adding up the distance that I measured on certain sections of the tracks on the road.

Q. That was in connection with this accident?



(Testimony of A. P. Bunderson.)

A. Yes sir.

Q. The figures 238 and 123 and then 714, what does that refer to?

A. The total amount of feet travelled. Those figures are what I used. [130]

Q. The notation culvert number 100, what does that refer to?

A. Those figures 100, 650, 414 x 15 were numbers on a culvert a short distance from where the car laid.

Q. Calling your attention to the sketch on the paper right here (indicating), what does that represent?

A. These lines you mean?

Q. Yes.

A. That is the tracks I measured.

Q. What are these two lines (indicating)?

A. The edge of the road, or rather the oil, the paved portion on both sides of the road.

Q. Now, the figures along the line?

A. The 117 represents the total amount of feet travelled after the car had left the west side of the oil until it came back on the oil.

Q. And what does the 177 refer to?

A. That is the amount or number of feet from the time it got on the west side of the oil until it left the east side of the oil again.

Q. The figure 146?

A. That is where it crossed the oil and came back off again.

Q. And this figure 66?

A. The distance before it came back on the oil.

(Testimony of A. P. Bunderson.)

Q. And the figure 92?

A. Where it crossed the oil from the west to the east.

Q. Now, the figure 82? [131]

A. That is the distance from the east side of the oil to where the car laid.

Q. And the figure 41 ft.?

A. That was the measurement from the oil straight to the car.

Q. What does this notation "car" with a box around it mean?

A. That *the* the way I diagram an automobile.

Q. 48 point 9, what does that have reference to?

A. I don't know.

Q. Was that made in connection with the accident?      A. Yes sir.

Q. Are there any other figures or drawings on the exhibit other than I have asked about?

A. Yes sir.

Q. What is that?

A. 18 point 8, and that is the oil surface of the road. That is how wide it was at the place where it went off and the five feet in the shoulder from the oil to the shoulder of the road.

Q. Are there any other figures that we have not taken into consideration?

A. No sir, I don't think so.

Mr. Coughlin: Now, we offer the exhibit again.

The Court: Do you have any objection? [132]

Mr. Merrill: Yes, we renew our objection to the offer of the exhibit. It now plainly appears that

(Testimony of A. P. Bunderson.)

it contains matters, written data concerning which he has previously testified. It amounts now to a written statement of the testimony and not merely a map or plat of the condition found there but it contains considerable *data* that he has heretofore testified to. It is immaterial, irrelevant and it is incompetent to be introduced in that form.

The Court: It may be admitted.

Q. Now, Mr. Bunderson, will you kindly hold the exhibit up so the jury can see it and explain the exhibit to them?

Mr. Merrill: Now, we object to this, he has testified to it in all its details. It is incompetent, irrelevant and immaterial.

The Court: He may answer. A. These are tracks, and these marks here (indicating) are the sides of the oil. This arrow points north. These two marks as I say, are marks I drew to indicate the side of the oil. This is the place I measured across, it is eighteen feet and eight inches. This mark, I just made the drawing out here to show the amount of feet that the tracks came down in length here, the tracks led out here (indicating) and when it went back on the oil it was 117 feet. They came across the oil here and it was 177 feet and then they stayed off the oil for 166 feet and then [133] back across the oil again for a distance of 146 feet; then off the west side of the oil for a distance of 66 feet and crossed back on the east side of the oil again, and that distance was 92 feet, and then from the edge of the oil to where the

(Testimony of A. P. Bunderson.)

automobile laid was 82 feet. Then I measured from the car straight to the oil which is 42 feet. This figure five here is to represent the 5 foot shoulder on each side of the oil.

Q. Will you just describe the ground where the car was laying at that time, after the wreck?

A. It was just sage brush, open country.

Q. Calling your attention to exhibit 4 I will ask you what that is?

A. That is a picture of the wrecked automobile located in the Garage at Montpelier.

Q. Is that a faithful representation of the condition of the car after the accident?

A. Yes sir.

Mr. Coughlin: I will offer that in evidence.

Mr. Merrill: No objection.

Mr. Black: No objection.

The Court: Admitted.

Q. Now, I will ask you what this is?

A. That is a picture taken in the garage at Montpelier of the same automobile. [134]

Q. Is it a faithful representation of the condition of the car at the time it was taken after the accident?

Mr. Merrill: Objected to as leading and calling for a conclusion of the witness.

The Court: It may be leading, but he may answer. A. Yes sir.

Mr. Coughlin: We offer the exhibit in evidence.

Mr. Merrill: Objected to as incompetent, irrelevant and no proper foundation laid for its reception.

(Testimony of A. P. Bunderson.)

The Court: Admitted.

Q. Calling your attention to plaintiff's exhibit 6 I will ask you what it is?

A. It is a picture of the right side of the car. The same automobile.

Mr. Coughlin: We offer the exhibit in evidence.

Mr. Merrill: We object to that because it is immaterial, incompetent and irrelevant and no proper foundation is laid.

The Court: The objection is sustained as to the foundation not being laid.

Q. Does that picture fairly represent and is it a fair likeness of the car? A. Yes sir. [135]

Mr. Coughlin: We reoffer it.

Mr. Merrill: We renew our objection and we call the attention of the Court to the fact that there is a very distinct difference between the picture they first introduced with reference to the right wheel and this picture. This picture shows the car in a jacked up position and therefore tends to be misleading, not showing the true condition. There is no showing here that these pictures or this picture was taken at the time of the accident or that the car was in the same condition as it was at the time of the accident.

The Court: No,—that is true,—there is no showing that the picture was taken at the time of the accident, or a year before or a year after or anything of that kind. The objection is sustained.

Q. Mr. Bunderson, who took the the picture referred to.



(Testimony of A. P. Bunderson.)

A. Mr. Grey, a local photographer in Montpelier.

Q. At whose request did he take this picture?

A. Mine.

Q. Where is this car located as shown in the picture?

Mr. Merrill: Objected to as there is no testimony as to who was there and when it was taken.

The Court: He may answer.

A. You mean when the picture was taken, where was the car at that time?

Q. Yes. [136]

A. In the Ford Garage.

Q. In Montpelier. A. Yes sir.

Q. How long after the wreck, if you know, was it taken?

Mr. Merrill: Objected to as the question calls for a conclusion. Unless the man was present he would not know and there is no testimony that he was present.

The Court: He may answer, if he knows.

A. Next day.

Q. Did you see the car there the next day?

A. Yes sir.

Q. Is that a fair representation of the way the car looked after the accident?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and upon the ground that no proper identification of the picture or the car has yet been had.

(Testimony of A. P. Bunderson.)

The Court: I think he testified that it was a picture of the car. However, the question seems to be leading and I still sustain the objection.

Mr. Coughlin: We will reoffer the picture.

Mr. Merrill: We offer the same objection. There is no testimony that this man was [137] present when the picture was taken.

The Court: Objection overruled, it may be admitted.

Q. Mr. Bunderson, do you know Mr. L. R. Donnelly?  
A. Yes sir.

Q. Where did you first meet him?

A. In Montpelier, Idaho.

Q. Will you describe the circumstances under which you met Mr. Donnelly?

A. It was nothing particular only he just came up and introduced himself and told me that——

Mr. Merrill: We object to any further answer that he is attempting to make now, he has answered the question and any further answer would not be responsive.

Mr. Coughlin: Very well.

Q. When did you meet him?

A. It was the next day or two after the accident.

Q. Have you testified where you met him?

A. No sir.

Q. Where did you meet him?

A. I don't remember.

Q. How did he introduce himself.

A. Just by telling me his name and handing me his card.

(Testimony of A. P. Bunderson.)

Q. State what he said. [138]

Mr. Merrill: We object to that as repetition.

Mr. Coughlin: We will ask to have this card marked.

Q. Now, calling your attention to what has been marked as Plaintiff's exhibit 7, I will ask you what it is?

A. That is the card Mr. Donnelly gave me at the time we met.

Mr. Coughlin: We offer this exhibit in evidence.

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial for any purpose whatever.

The Court: It may be admitted.

Q. At the time you made your investigation of the accident was Mr. Hair present? A. No sir.

Q. Was he present at any time that you were at the scene of the accident? A. Yes sir.

Mr. Coughlin: You may cross examine.

#### Cross Examination

By Mr. Black.

Q. Mr. Bunderson, when did you first learn of this accident?

A. You mean the day or the time.

Q. What day and what time?

A. I think it was the 11th of September, and it was about five or five-thirty in the afternoon. [139]

Q. Did someone inform you that there had been an accident? A. Yes sir.

Q. Do you remember who that was?

A. I think it was the Chief of Police at Montpelier.

(Testimony of A. P. Bunderson.)

Q. What did you do then?

A. I asked him where the accident was and he told me it was over the Georgetown divide. He said that the party who phoned in wanted me to come out immediately and I went out.

Q. Were you in Montpelier or in Paris?

A. In Montpelier.

Q. You didn't do anything except go out there, —you just got in your car and went out there after you heard about it, is that right.

A. Yes sir, that is right.

Q. And when did you make the investigation, right away?      A. Yes sir.

Q. Who was with you?

A. Willard Bruce and Glen Coughlin.

Q. You were the Sheriff at that time?

A. Yes sir.

Q. How did Mr. Coughlin happen to be with you?

A. He was standing on the sidewalk with Mr. Bruce and the Chief at the time I drove up to the Police Station.

Q. So he goes along with you out to the scene of the accident?      A. Yes sir. [140]

Q. Who was Mr. Bruce?

A. The principal of the elementary schools at Montpelier.

Q. Is he here in the Court room?

A. No sir.

Q. The estimated distance, which you had, from

(Testimony of A. P. Bunderson.)

this accident to Montpelier, or from Montpelier out to the accident was twenty miles?      A. Yes sir.

Q. How far is it from Montpelier to Soda Springs?      A. About thirty-two miles.

Q. You didn't make any arrangements about the wrecker before you left town?

A. I don't remember.

Q. Don't you know that Mr. Hair himself went and made arrangements about the wrecker coming out there, and that he came out with it?

A. I think that is right, yes sir.

Q. When the wrecker arrived Mr. Hair was with them?      A. Yes sir.

Q. Had you made these measurements before Mr. Hair got out there?      A. Yes sir.

Q. Did you make any at all after he was there?

A. No sir.

Q. How long a time was it that you were there making the measurements and so forth before Mr. Hair arrived? [141]

A. I had been through with the measurements for several minutes when he came.

Q. Did you show him the measurements you had made, or anything of that kind?      A. No sir.

Q. Did you tell him about the measurements you had made?      A. Not that I remember.

Q. Did you take him over the scene of any of these measurements?      A. No sir.

Q. Did you discuss these measurements with him in any way?      A. Not that I remember.



(Testimony of A. P. Bunderson.)

Q. Did you look at the car before the wrecker picked up this car?      A. Yes sir.

Q. Did you look at it and examine it before the wrecker picked it up?

A. No, I didn't examine it.

Q. Did you do anything with the car before the wrecker man came there?      A. No sir.

Q. And it was in the same position when he got there as it was when you got there?

A. Yes sir.

Q. Did you notice the tires on this truck when you made the investigation?

A. I noticed one front tire was down. [142]

Q. Which one?

A. I think it was the right one.

Q. Did you notice its condition?

A. It was down.

Q. Did you notice the condition of the tire itself?

A. No sir.

Q. You didn't notice whether it was torn, or had a hole in it?      A. No sir.

Q. And you didn't afterward examine it for that purpose?      A. No sir.

Q. Did you make an investigation to see what caused this tire to be down?      A. No sir.

Q. Were the other tires on the car inflated?

A. Yes sir.

Q. Did you notice their condition as to whether they were smooth, or did you notice the condition of their tread?      A. No sir.

Q. Anyone in the car when you got there?

(Testimony of A. P. Bunderson.)

A. No sir.

Q. Were there any people around there?

A. No sir, Oh! yes, there was one other person.

Q. Who was there? A. Mr. Bacon.

Q. Where does he live? [143]

A. At Georgetown.

Q. Is he here in Court? A. No, sir.

Q. Then, during the entire investigation there was you and the two gentlemen, Mr. Coughlin here and Mr. Bruce, and Mr. Hair came up with the driver of the wrecker.

A. Yes, he came with the wrecker.

Q. Who was the driver of the wrecker?

A. Mr. Oxenbine.

Q. From what garage?

A. The Ford Garage in Montpelier.

Q. You don't have any personal recollection of what time of day the accident actually occurred?

A. No, sir.

Q. When you got there I think you said there was some merchandise scattered around the scene of the accident. A. Yes, sir.

Q. What did it consist of?

A. There was a lot of chewing tobacco but I don't recall the make. The only thing that I remember is the Camel cigarettes.

Q. Did you notice whether they were wet or dry? A. No, sir.

Q. They were in close proximity to the car?

A. No sir, they were scattered all around there.

Q. Did you help pick them up? [144]

(Testimony of A. P. Bunderson.)

A. Yes sir, after the wrecker got there I helped.

Q. Do you remember them being wet?

A. No sir.

Q. You don't remember them being wet or dry?

A. No sir.

Q. You stated that the shoulders along this place were approximately how wide, on either side.

A. About five feet.

Q. What kind of texture are those shoulders?

A. Gravel surface.

Q. What was the condition as to their being soft, or being wet?      A. They were wet.

Q. And soft?      A. The top was soft.

Q. Where the right hand wheels were off the right hand side of the pavement did you notice how far the tires sank into the shoulder?

A. I noticed how far but I cannot tell how far.

Q. They did sink into the soft shoulder as they went off the oil or pavement?

A. Yes sir.

Q. According to your drawing the right hand wheels were off the pavement on the right hand side twice?      A. Yes sir.

Q. That is correct, is it? [145]      A. Yes sir.

Q. The condition of the shoulder was the same all along there so far as being wet and soft?

A. Yes sir.

Q. How about the condition of the shoulder on the other side as to being wet and soft?

A. The same way.

Q. Did you measure the width of the oil, the hard surface of the road?      A. Yes sir.

(Testimony of A. P. Bunderson.)

Q. What was the width?

A. I don't remember exactly but I believe it is eighteen feet and eight inches, it is there on the plat.

Q. Did you measure more than in one place?

A. No sir.

Q. Is the width the same all along there so far as the oil surface is concerned?

A. I think so.

Q. What kind of surface is that?

A. Hard oil surface.

Q. Smooth? A. Yes sir.

Q. Now, the road along there, were there any curves near the accident? A. No sir.

Q. Did you notice particularly?

A. Yes sir. [146]

Q. You show a curve off to the right hand, at the bottom of the exhibit, is that a correct representation? A. No sir.

Q. That curve should not be there as to showing how the highway was, that is, as to being straight or crooked. A. No sir.

Q. It should not be there, that is correct?

A. That is right.

Q. In other words prior to the truck going off the highway the first time, there was nothing to indicate but what it was going in a straight line, that is, straight along the highway, so far as you know? A. That's right.

Q. Before it went off the highway?

A. That's right.

Q. You didn't look at any marks north toward

(Testimony of A. P. Bunderson.)

Soda Springs, north of where you made this investigation?      A. Off the oil or on?

Q. Off the oil.      A. No sir.

Q. Were there any tracks other than those tracks you have marked on the map?      A. No sir.

Q. Were these marks like the marks you have on the map, that is, were they distinct all the way or just in places?      A. All of the way. [147]

Q. All the way?      A. Yes sir.

Q. On the right hand or the left hand side or double tread marks all of the way. Were they tracks of both wheels all of the way?

A. No, part of the way.

Q. On which side was the mark continuous, on the right or the left, if it was continuous?

A. You mean the tracks of the car?

Q. Yes.

A. I would say it was continuous until the last time it crossed the road.

Q. Were they both continuous all of the time until it crossed the road the last time?

A. Yes, they were both continuous until the last time they crossed the road.

Q. If the pavement had been dry would there have been a mark such as you saw there? If the pavement had been dry at the time they were made?      A. I doubt it.

Q. And that would indicate that at the time the marks were made the pavement was wet.

A. Yes sir.

Q. I think you said that the oil part of the road looked dry when you got there. [148]



(Testimony of A. P. Bunderson.)

A. It was dry.

Q. You don't know how it was when this car made these marks?      A. No sir.

Q. Do you know whether it rained that afternoon in Montpelier?      A. I don't remember.

Q. Now, did Mr. Coughlin or Bruce assist you in any way in making this investigation?

A. Mr. Bruce did.

Q. He was with you all of the time in making these measurements?      A. Yes sir.

Q. What else did you do besides the measurements in making the investigation?

A. Well, I just took the measurements and observed as much as I could see.

Q. Did you go to the end to see or observe where the car went off the pavement?      A. Yes sir.

Q. Mr. Coughlin was along?

A. I don't remember.

Q. Mr. Bruce was along?      A. Yes sir.

Q. When did you make this map?

A. At the time I was at the car. I looked at the car and then I went up to my car and got the steel tape and walked along,—I got this piece of paper out of the car and we walked along and made the measurements and [149] made these figures as we went along.

Q. And that has not been changed since?

A. No sir.

Q. These are in your hand writing (indicating)

A. Yes sir.

Q. Examine them.

A. Yes sir, they are mine.

(Testimony of A. P. Bunderson.)

Q. What do you mean by the statement when you say "all alone with the investigation"?

A. What was that?

Q. What do you mean by this statement, you say "all alone with the investigation", were these other people with you?

A. I think you read that wrong.

Q. What does it say.

A. All done with the investigation at six-forty.

Q. Have you had any experience in driving a car or truck with a tire blown out?

A. Not a truck.

Q. Not with a truck as heavy as this?

A. No sir.

Q. You have with a car?

A. I don't remember of having a blow-out on a car.

Q. So from any personal experience you don't know what a car does if a tire blows out?

A. That's right.

Q. You don't know what effect it has on a car or truck from [150] actual experience.

A. Yes sir.

Q. But I assume from your answers that you have not been in a car when it was driven and a tire blew out?

A. If I have I don't remember it.

Q. Did you notice anything about the weight of this truck?

A. No sir.

Q. Did you notice anything about what kind of a load was in the back end of this car?

(Testimony of A. P. Bunderson.)

A. Yes sir.

Q. What was that condition?

A. Well, it was loaded so that we had quite a time getting all the merchandise back in the truck.

Q. After it was taken out you had to work hard to get it back?

A. It had broken the big boxes that the cartons of cigarettes were in and we had to throw them back in.

Q. You don't know what the weight of the back end of the car was compared with the other part of the load?

A. No, sir.

Q. Along this highway was there any borrow pits?

A. Yes, sir.

Q. On which side?

A. Both.

Q. About what was the extent of the borrow pit on the east [151] side? What was the extent of the borrow pit where the truck went off?

A. The borrow pit was deeper there than it was where the car first went off.

Q. How wide was the borrow pit at that point?

A. I didn't measure them.

Q. How deep was it?

A. I say, I didn't measure them.

Q. What is your best judgment as to how deep the borrow pit was at the point where the car went off?

A. From the top of the road?

Q. From the edge of the road?

A. I would approximate it about two and a half feet deep.

(Testimony of A. P. Bunderson.)

Q. At that point did the borrow pit go off abruptly?      A. No, sir.

Q. But a car in going over there,—did this car go over straight across the highway or at an angling position?      A. The last time, you mean?

Q. Yes.      A. At an angle.

Q. A car or truck going over there in an angling position, what effect would it have on the car as to tipping or rolling?

A. That would depend on how the car went down over.

Q. It would have a tendency to twist or roll the car?      A. I think so. [152]

Q. The borrow pit on either side of the road where this accident occurred,—was it about the same on both sides?

A. It wasn't as deep the first and second times the car crossed the road.

Q. But there was a borrow pit along all the places you have marked on this map?      A. Yes, sir.

Q. Do you know how wide this truck is?

A. No, sir.

Q. You never measured that?      A. No, sir.

Q. Was there any line in the middle of the paved part of the highway there showing where the middle of the paved part of it was?

A. Not that I noticed.

Q. On your exhibit you have some kind of line through the middle, you don't mean that there was anything on the pavement that would mark the middle?

(Testimony of A. P. Bunderson.)

A. I cannot recall what that marking is.

Q. At the present time you don't remember any mark there in the middle or the center of the highway?

A. No, sir.

Q. Counsel asked if you saw any stones along the right hand side of the highway,—did you look for any?

A. No, sir.

Q. They could have been there and you would not have seen [153] them?

A. They would have to be very small.

Q. But they could be there?

A. I doubt it.

Q. Does it take a big stone to cut a tire?

A. No, sir.

Q. A little one can cut a tire?

A. Yes, sir.

Q. You don't know whether there was a stone there such as would cut a tire?

A. No, sir.

Q. Did you examine the shoulder all along there, the oil and the shoulder to see whether it was rough or smooth?

A. Yes, sir.

Q. What was its condition?

A. Smooth.

Q. When you get off the oil and tried to get back do you know of tires being bruised from this sort of experience?

A. Yes, sir.

Q. That could happen even where there is a shoulder such as was along there?

A. I wouldn't know about that.

Q. You wouldn't know about that?

A. No, sir.

Q. I think you said there was a culvert near where this [154] car came to a stop?

A. Yes, sir.



(Testimony of A. P. Bunderson.)

Q. Nearer to Montpelier or toward Soda Springs?      A. Toward Soda Springs.

Q. How near to where the car came to a stop was it?      A. I didn't measure it.

Q. You didn't measure that?      A. No, sir.

Q. Do you have any personal recollection of it now?      A. Yes, sir, I recall the culvert.

Q. What is your recollection of the distance?

A. About forty feet.

Q. What kind of a culvert is that?

A. One of the galvanized culverts.

Q. Does it have any rims or ends sticking up above the surface of the pavement?

A. No, sir.

Q. It does not stick out past the end of the shoulder on each side?      A. A little.

Q. That would be visible if you were driving along there?      A. Yes, sir.

Q. You could see that sticking out?

A. Yes, sir.

Q. I understand you were not present when any of these pictures were taken?

A. That's right. [155]

Q. The photographer took them himself?

A. Yes, sir.

Q. You had nothing to do with arranging the car when the pictures were taken?      A. No, sir.

Q. All that you know is that they were taken, and that these are the ones?      A. Yes, sir.

Q. You don't know when they were taken?

(Testimony of A. P. Bunderson.)

A. Yes, sir.

Q. When were they taken?

A. The next day.

Q. How do you know?

A. The photographer told me he would go right down.

Q. You don't know whether he took them the next day or the second day?

A. No, sir, I don't know for sure.

Q. When did you first see these pictures?

A. I don't remember when I got them from the photographer's.

Q. How long was the car in the garage at Montpelier?

A. I wouldn't know.

Q. You don't know when it was moved?

A. No, sir.

Q. You don't know whether the mechanics did anything to the car before it was moved?

A. No, sir. [156]

Q. You don't know who took it away?

A. No, sir.

Q. You didn't examine the car after it was in the garage, as to the tires?

A. No, sir.

Mr. Black: I think that is all.

### Cross Examination

By Mr. Merrill:

Q. Mr. Bunderson you made an investigation of the accident on the ground, that day?

A. Yes, sir.

Q. You endeavored to acquire all the information you could as to everything connected with it?

(Testimony of A. P. Bunderson.)

A. Just about.

Q. You made a report to the Department of Law Enforcement at Boise, Idaho? A. Yes, sir.

Q. You sent a copy of the report and kept the original in your office? A. Yes, sir.

Q. You have that report with you now?

A. Yes, sir.

Q. That was the report you had in your hands yesterday when you were testifying?

A. Yes, sir. [157]

Q. Now, Mr. Bunderson you made out a report on the ground did you? A. No, sir.

Q. Where did you make it,—the report, where did you make it out?

A. I think these two reports were made out in the Police station in Montpelier.

Q. Was Mr. Hair there when the reports were made out?

A. This report (indicating) he was.

Q. Are these copies of the reports you sent to Boise?

A. No, sir, I don't think so. I think these are the reports I had in the police station gathering my information and completing the report.

Q. In this you say the car number was 3A150.

A. The car license and that was right.

Q. You say the car was going south.

A. I saw tracks leading south.

Q. You say it was raining.

Mr. Davis: You have a right to look at the report if you want to.

(Testimony of A. P. Bunderson.)

Mr. Black: Yes, he has that right.

Q. Do I have a right to look at the report?

The Court: If you want to, you have the right to look at it.

Q. Isn't it a fact Mr. Bunderson, that the report you sent [158] to Boise was signed by both yourself and Mr. Hair? A. I don't remember.

Q. Isn't it a custom to do that?

A. Yes, sir.

Q. That is the usual custom? A. Yes, sir.

Q. Isn't it a fact that on the report you sent to Boise there was contained Mr. Hair's statement as well as your notations as to what you found on the scene of the accident? A. I don't know.

Q. Isn't that the usual custom?

A. Either one or both are ways to send in reports.

Q. Isn't that the usual custom?

A. I don't know.

Q. Isn't it the general way to make out a report and that both you and the party involved in the accident sign it? A. Yes, sir.

Q. And then you send that report to the Boise office? A. Yes, sir.

Q. That is the usual custom? A. Yes, sir.

Q. That was done in this instance?

A. I don't know.

Q. You wouldn't say that it wasn't?

A. Not until I looked at the report. [159]

Q. Why did you keep two copies of this report in this case?

(Testimony of A. P. Bunderson.)

A. I think they are part of my rough sketch and the information gathered.

Q. Isn't it a fact that you have made up one since the accident and the other about the time of the accident?      A. I don't know.

Q. You wouldn't say that you didn't do that. That has been marked as an exhibit. Is not that a duplicate of the report that you sent to the Boise office?      A. I don't know.

Q. It is a report that you made up.

A. This is the report that Mr. Hair filled out for me.

Q. Did you make that out on the front?

A. No, sir.

Q. I hand you exhibit 9 now, and I will ask you did you make that out?      A. Yes, sir.

Q. Now, is there any difference on the front of these two?

Mr. Davis: I submit that the reports speak for themselves.

The Court: I think that is correct unless you point out some special matter in the report.

Q. Mr. Bunderson, exhibit 8, is that one you made out?

A. No, sir,—just a minute, wait a minute. Exhibit 9 was made by me. [160]

Q. That was made by you after the investigation?

A. Yes, sir.

Q. Now look on the front of it, it says "estimated speed before accident 40 miles."

A. That is what Mr. Hair told me.



(Testimony of A. P. Bunderson.)

Q. That is what you determined it to be, and so made the report?

Mr. Davis: I submit that the witness may explain. A. No, sir.

Q. Why did you make the report to that effect?

A. Because I asked Mr. Hair the speed because he was there.

Q. You put in that estimated speed at the time of the accident was thirty miles an hour?

A. Yes, sir.

Q. And that is what you reported?

A. Yes, sir.

Q. You also put on there lawful speed 40 miles?

A. Yes, sir.

Q. That is what you put on there?

A. Yes, sir.

Q. And also maximum safe speed under conditions prevailing fifty miles an hour?

A. Yes, sir.

Q. And that was a fact? A. Yes, sir. [161]

Q. And you so put it on the report?

A. Yes, sir.

Q. You also marked on there to the effect that it was raining? A. No, sir.

Q. Don't you see that on there?

A. Yes, sir.

Q. You reported to the Boise office?

A. I didn't put it on the back.

Q. On either of them? A. No, sir.

Q. Do you mean to say that you filled out the front of one and Hair the front of the other?

(Testimony of A. P. Bunderson.)

A. Yes, sir.

Q. On the back of the report you made out appears the mark opposite the word "raining".

A. I never filled the back.

Q. On the back of the exhibit you said you mailed a copy of to Boise it bears a mark opposite the word "raining".

Mr. Davis: My recollection is that he didn't say that he mailed a copy to Boise. He said that he didn't know.

A. I don't know what report that is, you keep saying the one you mailed to Boise.

Q. On the one that you have Mr. Bunderson, that you said you sent to Boise. [162]

A. I didn't say either of these was a copy.

Q. But that appears on these copies?

A. Yes sir, it does.

Q. These copies both have been in your possession since the time of the accident? A. Yes, sir.

Q. And you brought them to Court?

A. Yes, sir.

Q. You had them attached to exhibit 3 that was introduced in evidence? A. Yes, sir.

Q. And detached them here? A. Yes, sir.

Q. They are a part of your records?

A. Yes, sir.

Q. And a part of the files that you have kept in this case are they not? A. Yes, sir.

Mr. Merrill: We offer in evidence exhibits 8 and 9,—defendant Tobacco Company's exhibits 8 and 9.

(Testimony of A. P. Bunderson.)

Mr. Coughlin: We have no objection.

The Court: That may be admitted.

Mr. Merrill: I want to read parts of this to the jury. [163]

Mr. Davis: If the exhibit is going to be read I suggest that it all be read and not just a part of it.

Mr. Merrill: It would be hard reading it all, it contains some matters that are pertinent here and many matters that are not, and are immaterial for any purpose. It would take an hour to read it all.

The Court: The exhibit will be before the jury in its entirety, and I doubt that any certain part of the exhibit should be called to the attention of the jury.

Mr. Merrill: If that is the ruling of the Court that I will read the whole report. The heading reads, "Mail report to Department of law enforcement, Boise, Idaho" and the portion of the report that is filled out by the officer, "accident occurred in Bear Lake County. Twenty miles north of Montpelier, Bear Lake County. Indicate exact mileage or distance, using two mileages and two directions if necessary. Accident occurred on 30 N U. S, check class of highway. At intersection with" and that is blank. "Time of accident, day, Friday, date, 9-11-1942, time 4:15 P. M." under the heading "your vehicle, No. 1" "Year and make, 1941 Chevrolet panel, car license number 3A 150 going south on highway 30 N. Parts of vehicle [164] damaged, all body, amount \$600.00, driven by R. D. Hair 209 South seventh, Pocatello, Idaho, phone 2788W, age

(Testimony of A. P. Bunderson.)

thirty, sex male, color white, driving experience twelve years, number of passengers, one, operators license number 170832, owned by L. R. Donnelly Address, 532 Judge Building, Estimated speed before accident 40 estimated speed at moment of accident 30, lawful speed 40, maximum safe speed under conditions prevailing 50." The next part under the heading "vehicle no. 2" is all blank. The next part of the report under the heading "injured" "Name Avenell Newby, age 28, address Montpelier Idaho, taken to Bear Lake Clinic, give exact location in vehicle, right side, in vehicle number 1." The next where there is anything marked by the officer, is in a square opposite "going straight ahead" On the other side of the report: "had not been drinking not marked; had been drinking, if so, not marked; obviously drunk, not marked, ability impaired, not marked; ability not impaired, not marked; not known whether impaired, marked. Traffic control, no control, marked; Weather, raining, marked; daylight, marked; Condition of vehicle, no defects, marked. Kind of locality, open or other, marked; Roadway character, straight road, marked; Hill crest, marked; Type and condition of surface, oil, marked; Describe accident, also use this space for data on third vehicle, additional witnesses or [165] injured persons and explanation of questions not fully answered by checking in the boxes provided. While traveling south on Highway 30 N, and 22 miles north of Montpelier I met a semi truck trailer

(Testimony of A. P. Bunderson.)

riding a little over the yellow line. In order to pass I rode my two right wheels on the shoulder which was soft with rain which put my car out of control. While it was out of control I hit a rock blowing my right front tire and causing my car to roll over. R. D. Hair, 209 So. 7th 9/11/42''.

Mr. Davis: Which one did you read, exhibit 8 or 9?

Mr. Merrill: I read exhibit 8.

Q. Now, Mr. Bunderson, on your map you show a yellow line in the center of the oiled portion of the highway. You didn't testify that any such line existed, what is the fact? A. I don't know.

Q. Why did you make a yellow line on the map?

A. Sometimes when I make a report I make a yellow line down the center and measure from the yellow line to the edges.

Q. Now, look at your exhibit 3 and you will observe a marking of the yellow line.

A. Yes, sir.

Q. It is shown in the middle of the highway.

[166]

A. Yes sir.

Q. Was there or was there not a yellow line on the highway? A. I don't know.

Q. Why would you put it on if there wasn't any?

A. There must have been one or I wouldn't have put it on.

Q. What is your best judgment, or your explanation for it?



(Testimony of A. P. Bunderson.)

A. I don't remember a yellow line.

Q. Now, Mr. Bunderson, tell me, do you or do you not remember a yellow line on there?

A. No sir.

Q. Why don't you remember whether there was a yellow line?

A. Well, I recall measuring the width of the highway.

Q. You remember everything else, did you recall a yellow line?      A. No sir.

Q. But still you put it on your map?

A. Yes sir.

Q. The shoulder of that highway was built or constructed of gravel or dirt?      A. Yes sir.

Q. You have seen roads under construction?

A. Yes sir.

Q. You know that dirt and rock is used in the basic part of the road?      A. Yes sir.

Q. You know that there are rocks in the shoulders of an oiled road? [167]      A. Yes sir.

Q. When this car went off the side of the road it made a perceptible marking on the shoulder.

A. Yes sir.

Q. How deep was that rut, do you know?

A. No sir.

Q. Did you take any measurements of that?

A. No sir, I looked at it.

Q. You know that it was perceptible and a well defined mark.      A. Yes sir.

Q. The edge of the oiled surface was very rough?

A. I didn't observe that.

(Testimony of A. P. Bunderson.)

Q. But don't you know that from experience Mr. Bunderson, that the edge of an oiled highway is rough, generally? A. I didn't notice that.

Q. Isn't that your general information touching the construction of such highways?

A. Is is and it isn't.

Q. What do you mean by that?

A. Well, some parts of the highway is what you asked about and some isn't. I didn't notice anything along there.

Q. You didn't make any investigation of that?

A. Yes sir.

Q. What did you do?

A. I found that the oil led right to the gravel.

Q. You found gravel there? [168]

A. Yes sir.

Q. Did you determine, with Mr. Donnelly, that the tire had been cut and blown out?

A. Not that I remember.

Q. Didn't you make an explanation to Mr. Donnelly how this accident had happened, as a result of your investigation?

A. Not that I remember.

Q. Do you remember meeting with Mr. Donnelly on a Sunday afternoon in September, in the office of the Chief of Police?

A. I remember meeting him.

Q. And in that conversation did you say in substance in answer to a question: "What do you think caused the accident" and you you said: "from looking over the tracks the car made, it looked like

(Testimony of A. P. Bunderson.)

the car had been crowded off the road on the soft shoulder and while Mr. Hair was trying to control the car while being on the soft shoulder the right front wheel or tire apparently hit a sharp object which then threw the car completely out of control and the car turned over".           A. No sir.

Q. Did you tell him that in substance and effect?

A. No sir.

Mr. Merrill: That is all.

Redirect Examination

By Mr. Coughlin: [169]

Q. Mr. Bunderson, what is your opinion as to when the tire blew out?

Mr. Black: We object to that, the witness said he didn't know it had blown out.

Mr. Coughlin: They brought that out.

Mr. Black: We brought it out that he didn't know, that he didn't notice the tire.

The Court: Objection sustained.

Q. Mr. Bunderson, did you make any statement whatever to Mr. Donnelly concerning the cause of the accident?           A. No sir.

Q. Were there any rim marks on the oiled portion of the road there at the scene of the accident?

A. Not that I noticed.

Q. How far was the road straight there at the scene of the accident?

A. I would say a half a mile or a mile either way.

Q. A half mile or a mile.           A. Yes sir.

Q. And what do you mean when you say "either way"?

(Testimony of A. P. Bunderson.)

A. From the accident, north and south.

Q. Where was Mr. Hair when he came on the scene of the accident?

A. He was in the cab of the wrecker.

Q. Did he ever get out of the wrecker during the time you were there? [170]

A. I don't remember.

Q. Did Mr. Hair make any comment to you about the accident? A. No sir.

Q. Did he ask you to make any investigation?

A. No sir.

Q. Did he say anything to you about rocks being in the road? A. Not at the accident.

Q. At that time did he say anything to you about being crowded off the road by a semi-trailer?

A. Yes sir.

Q. At that time? A. Yes sir.

Q. Were there a number of paper cartons of merchandise in the truck?

Mr. Merrill: Objected to as not proper redirect.

Mr. Coughlin: Yes, I think that was answered.

The Court: Yes, I think you brought that out.

Q. Mr. Bunderson, in your opinion would an automobile going off into the borrow pit have a tendency to blow out a tire?

Mr. Merrill: Objected to as there has been no qualification shown, and it calls for a conclusion of the witness. [171]

The Court: He may answer.

Mr. Black: We join in that objection and also on the ground that it is incompetent, irrelevant and

(Testimony of A. P. Bunderson.)

immaterial in view of this witness's testimony that he made no investigation as to whether the tire blew out, and no experience by this witness of driving a car when the tire blew out.

The Court: He may answer, the Court has ruled.

A. I wouldn't know.

Q. Directing your attention to the marks on the highway, would certain of these marks have been made whether or not it was raining?

Mr. Merrill: We object to that on the ground that it is so indefinite we cannot know what he means.

The Court: Sustained, he has gone into that fully.

Mr. Coughlin: That is all.

#### Recross Examination

By Mr. Black:

Q. Did you talk with Mr. Hair at the place of the accident after he arrived there?

A. Yes sir.

Q. Did you ask him how the accident happened?

A. I don't remember the conversation between me and Hair, [172] but I know we talked a few minutes.

Q. Is that the place he told you that a semi-trailer crowded him off the road?

A. I think it was.

Q. And you didn't ask him about any rocks or things of that kind that you remember of now?

A. No sir.



(Testimony of A. P. Bunderson.)

Q. So far as you remember now, that is about all of the conversation that you remember?

A. Yes, it has been quite a while ago.

Q. Did you talk with him down town that evening, or the next day?

A. Yes sir, that evening.

Q. That evening,—did he again make *again make* any statement that he had been crowded off the highway by a semi-trailer?

A. I don't remember.

Q. If it is on that report that you brought in here would that indicate that you had such a conversation?

Mr. Coughlin: That is objected to as calling for a conclusion of the witness. The report that is in is in Mr. Hair's hand writing.

The Court: He may answer.

A. Yes sir.

Q. Did you see Mr. Hair write on the report? The part that is written in his hand writing on the report? A. Yes sir. [173]

Q. Where was that made?

A. In the Police station at Montpelier.

Q. You were there? A. Yes sir.

Q. When was it with reference to the accident, the same evening or the next day?

A. I think it was the next day.

Q. Was Mr. Hair present when you made your report to the State Law Enforcement Department that has been introduced in evidence?

A. No sir.

(Testimony of A. P. Bunderson.)

Q. He was not present? A. No sir.

Q. Who was present when you made that?

A. Nobody that I remember. That was in my office in Paris.

Q. That was made in your office?

A. Yes sir.

Q. That was put on there from your investigation and whatever you got from Mr. Hair?

A. Yes sir.

Q. You were familiar with the speed that was permissible on that highway? A. Yes sir.

Q. You had been a State Law Enforcement officer before you became Sheriff?

A. Yes sir. [174]

Q. It was a part of your duty to know what speed was permissible along portions of the highway that you were patrolling? A. Yes sir.

Mr. Black: That is all.

### Recross Examination

By Mr. Merrill:

Q. With respect to the conversation you had with Mr. Donnelly on September 13, 1942 did you talk about the accident? A. I think so.

Q. Do you remember what you did talk about?

A. No sir.

Q. Isn't it true that he inquired how the accident happened? A. I don't remember.

Q. Do you remember anything about the conversation? A. No sir, I don't.

Q. Then why do you deny having said what I read to you?

(Testimony of A. P. Bunderson.)

Why do you deny the conversation I asked you about?

A. Because I don't remember telling him.

Q. Well, did you or did you not?

A. I didn't.

Q. And you say that now, when you don't remember what was said at that time at all?

A. I don't remember of it.

Q. Did Mr. Donnelly just make a social call?

A. We talked about the wreck but I don't remember that he [175] said.

Q. You talked about the wreck?

A. Yes sir.

Q. Mr. Donnelly asked you how it happened?

A. I don't remember.

Q. You had made an investigation?

A. Yes sir.

Q. Mr. Donnelly came in and you talked to him about how it happened and what you found?

A. As I remember we talked about the accident.

Q. Mr. Donnelly asked you how it happened?

A. I don't remember that.

Q. And then you told Mr. Donnelly just exactly what I read to you? A. Not that I remember.

Q. Will you say you did or did not?

A. I say I didn't.

Mr. Merrill: That is all.

DR. R. B. LINDSEY

Being called as a witness on the part of the plaintiff after being first duly sworn testifies as follows:

Direct Examination

By Mr. Coughlin:

Q. State your name.

A. R. B. Lindsey.

Q. Where do you reside? [176]

A. Montpelier.

Q. How long have you lived there?

A. Most of my life and continuously since 1937.

Q. What is your profession?

A. Physician and surgeon.

Q. Are you a graduate of a recognized medical school? A. Yes sir.

Q. How long did you attend.

A. Seven years.

Q. From what school did you graduate?

A. Northwestern University, medical school.

Mr. Black: We will admit that *he a* practicing physician and will admit his qualifications.

Mr. Merrill: We join in that.

The Court: The record may show his qualifications are admitted.

Q. Do you know, or did you know Avenell Newby? A. Yes sir.

Q. Did you have occasion to treat her during the year 1942? A. 1942, yes sir.

Q. When was that?

A. It was on September 11, 1942.

Q. State the circumstances.

A. She was brought into the hospital. At that

(Testimony of Dr. R. B. Lindsey.)

time she was unconscious,—she was in an unconscious condition following an automobile accident.

[177]

Q. Who brought her in?

A. Mike McGuire.

Q. Go ahead.

A. Mr. McGuire came into the office and told me he had a lady in his car that he rescued from a wreck north of Montpelier, but that he couldn't get her into the hospital alone. I went down and helped him. She was unconscious at that time and we put her to bed.

Q. Did you make an examination of her at that time?      A. Yes sir.

Q. What did you determine was the extent of her injury?

A. She had a marked crushing of the chest and abdomen with internal injuries.

Q. How long was she in the hospital?

A. From memory I think she was there about four days.

Q. What happened then?

A. She died after being there four days in a semi-conscious condition. She expired.

Q. What was the cause of her death?

A. It was internal injuries in my judgment. Numerous internal injuries.

Q. Did you know Mrs. Newby before this time?

A. Yes, sir, I have met her,—I had met her before.



(Testimony of Dr. R. B. Lindsey.)

Q. Had you had occasion to treat her before?

A. Yes sir.

Q. You say you had treated her before? [178]

A. Yes sir.

Q. What was the condition of her health at this time?

A. She was in very good physical condition except that she called me in for the treatment of an ordinary cold.

Q. Do you know her age?

A. She was approximately twenty-eight years old.

Q. Do you know what her life expectancy was or would be?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and no proper foundation is laid.

Mr. Davis: This Doctor's qualifications were admitted.

Mr. Merrill: This is an actuary qualification and we didn't admit that he was qualified as an insurance adjuster.

Q. Doctor are you familiar with the table showing the life expectancy?

A. I am fairly familiar with them. I have never made any specialty of that branch.

Q. Are you able to state what her life expectancy was?

Mr. Merrill: We object to that no qualification is shown and the table would be the best evidence.

The Court: He may answer this question yes or no.

(Testimony of Dr. R. B. Lindsey.)

A. No.

Mr. Coughlin: You may examine. [179]

Cross Examination

By Mr. Black:

Q. You say Mrs. Newby was in an unconscious condition when she was brought into the hospital?

A. Yes sir.

Q. Did she remain in that condition until she passed away?

A. Not completely. She was completely unconscious when we took her into the hospital and following that time she had periods of semi-consciousness.

Q. Other than her visit to you about the cold did you have occasion to doctor her or administer to her? A. That was the only time.

Q. How long was that before this accident?

A. That was about thirty days, approximately.

A. About thirty days before the accident that she called on you? A. Yes sir.

Q. Prior to that time you hadn't administered to her or examined her physically for any condition? A. No sir.

Q. Now, after that cold did you treat her at all before the accident? A. No sir.

Mr. Black: That's all.

Cross Examination

By Mr. Smith:

Q. You said that Mrs. Newby was brought to the hospital [180] September 11, 1942?

A. *You* sir.

Q. What time of day? A. In the evening.

(Testimony of Dr. R. B. Lindsey.)

Q. What time of the day was it?

A. As near as I can remember it was about a quarter to five.

Q. You helped Mike McGuire carry her out of the automobile and in to the hospital?

A. Yes sir.

Q. After you had placed her in the hospital did you make any examination of her?

A. Yes sir.

Q. Was this examination immediately or some time after?      A. Immediately.

Q. Will you state briefly the extent of your examination?

A. I made a complete examination of the surface of the body to determine if there were any surface injuries; also an examination of her heart, lungs and a superficial examination of the abdomen to determine if there was a hemorrhage internally; also examined the scalp carefully to see if there was any sign of a fracture of the skull; also the pupillary reflex of the eyes. Just made a complete general physical examination at that time.

Q. Was she breathing? [181]      A. Yes sir.

Q. Are you familiar with the odor of alcoholic liquor?      A. Yes sir.

Q. I will ask you whether you detected any alcoholic odor on the breath of Mrs. Newby at that time?      A. No sir.

Q. I will ask you if you remember at Montpelier, Idaho, on March 23, 1943, when you were

(Testimony of Dr. R. B. Lindsey.)

present, Mr. Merrill was present, and I was present and we had a conversation with you concerning this case?      A. I remember you calling.

Q. Do you remember at that time we asked you that question, and do you remember your answer? Oh! yes, and Doctor Rich was also present.

A. I think your question was put differently at that time than it is now.

Q. Did you not at that time state that she had a strong alcoholic odor when admitted to the hospital,—before you answer that question, do you remember one other person was present?

Mr. Davis: Who was the other person?

Mr. Smith: Just a minute and I will give you the name.

Q. The nurse, Phoebe Tarbet was present at that time? [182]

A. No, I don't remember that she was present at the time of the conversation. Our conversation was finished and I called her from the hospital floor and from that time it was a conversation between you and Miss Tarbet.

Q. Relating to the conversation which we had in your office at which time you and Mr. Merrill and I were present and Doctor Rich stepped in sometime during the conversation, you remember that?      A. Yes, I do.

Q. And the question that I put to you was asked at that time and you made the answer that I said you made.

(Testimony of Dr. R. B. Lindsey.)

A. I think I made the statement that there was an alcoholic odor.

Q. What is the fact?

A. May I ask a question?

Q. Can you answer that question?

A. Yes, I could but the questions have been contradictory and that is the reason I am hesitating to answer.

Q. What is the fact, and if you have any explanation you can then make your explanation.

A. The fact is that I suspected that there was alcoholic odor to her breath, from my experience.

Q. Was there?

A. I am not in a position to prove that, but that was my opinion.

Q. Do you entertain an opinion now? [183]

A. I said in my opinion there was an alcoholic odor to her breath.

Q. After you made the examination that you have testified to, when was the next time that you saw Mrs. Newby?

A. I saw her about thirty minutes after the examination was finished.

Q. Will you state if you know, whether or not the contents of the patient's stomach was removed, and if so, in what manner, shortly after she was admitted to the hospital?

A. She vomited the contents of the stomach.

Q. Did you examine the contents?

A. I observed it, but did no laboratory work on it.



(Testimony of Dr. R. B. Lindsey.)

Q. How long did that occurrence happen after she was admitted to the hospital?

A. About fifteen minutes, maybe twenty.

Q. Was she conscious, semi-conscious or unconscious at that time?

A. Unconscious at that time.

Q. From your examination of the contents of the stomach,—you examined it by observation did you not?

A. Yes sir.

Q. From your examination do you have an opinion as to whether there was an alcoholic content in the contents of the [184] stomach?

A. Yes sir.

Q. And by the sense of smell, did you not?

A. Yes, sir.

Q. Now, will you state that opinion?

A. Well, in my opinion from the examination of the contents of the stomach it would be my judgment there was the presence of alcohol in the contents.

Q. Now, the second day after she had been admitted to the hospital, or approximately two days later, did you,—rather, did Mrs. Newby make a statement or remark to you relating to her conduct at the time or just prior to the time of the accident?

A. No sir.

Mr. Davis: We object to this unless it is shown that she was conscious at the time she is supposed to have made the remark.

The Court: He may answer if he knows.

Mr. Smith: I think the Doctor had answered.

(Testimony of Dr. R. B. Lindsey.)

A. Yes, I said no.

The Court: We will recess until 1:30.

(Admonition to the jury.)

1:30 P.M. October 21, 1943

Q. Doctor, is it not a fact that approximately two days after Mrs. Newby had been admitted to your hospital that she told you that she was a fool for going out—— [185]

Mr. Davis: Now, we object to this being placed before the jury for the reason that the testimony shows that this patient remained in a semi-conscious condition several days after the accident and this could not have anything to do with anything that would be material here.

Mr. Smith: We intend to show that declarations were made against interest and within the purview of cross examination.

The Court: I think I will excuse the jury and hear you on this matter.

(In the absence of the jury.)

The Court: Now, you may finish stating your question.

Q. Is it not a fact that at that time she told you that she was a fool for going out and getting drunk?

The Court: I would like to have your position on this matter.

Mr. Smith: We are asking this upon the theory of declaration made against interest. The materiality is that it is in part based upon the doc-

(Testimony of Dr. R. B. Lindsey.)

trine of assumption of risk and contributory negligence.

The Court: What have you to say Mr. Davis?

Mr. Davis: He cannot introduce any declaration against interest without laying the [186] foundation. There is no showing here that she knew what she was doing at that time. The testimony is to the effect that during all this time she was in a semi conscious condition. Second, as to that being a charge of contributory negligence; it has developed now that the defendant Hair claims this accident was caused by his being forced off the road, and her actions could not have possibly in any way contributed to that. The cases are to the effect, or, there are cases to the effect that where a guest furnishes liquor to the driver of a car and gets the driver of a car drunk, some authorities hold that there is an assumption of risk. That is not the case here, and in this instance the evidence is offered for the purpose of injuring or attempting to injure this young woman's reputation, and I say they should not be allowed to make any such statement as this unless they can make some showing. They have not yet proved anything about her being intoxicated——

Mr. Merrill: ——Counsel overlooks the fact that we had had no opportunity to prove our case at all as yet. We don't claim that this is a part of the *res gestae* at all. The only thing is this, it is an admission by her *or* her condition and misconduct and it has a vital effect in this case.

Mr. Smith: Counsel made the statement that

(Testimony of Dr. R. B. Lindsey.)

it is developing in this case, or that [187] it is indicative at least that Hair ran off the road and his car became out of control. I am just wondering now if counsel is making an election on one of the two theories we attempted to force an election on in this case. One was the alleged acts of negligence on the part of the employers in hiring this man, it being alleged that he had a previous record in driving automobiles, and the second theory is the negligent acts in carrying gratuitous guests under the guest law. I am wondering at this time whether or not we can force them to make an election on their theories at this time, and we will renew *out* motion for election.

The Court: I think the Bailiff may call the jury.

(The following proceedings had in the presence of the Jury.)

The Court: The witness may answer the question.

Mr. Smith: I will ask the question again.

Q. Did Mrs. Newby, after she had been admitted to the hospital and been there approximately two days, *made* the statement to you that she had been a fool for going out and getting drunk?

A. No sir.

Q. What did she say in that regard?

A. Absolutely nothing. [188]

Q. She said nothing about that?

A. Absolutely nothing to me.

Q. Did you hear her say anything to anybody?

(Testimony of Dr. R. B. Lindsey.)

A. No sir.

Q. I am going to call your attention to an incident in March 1943, during the late afternoon at which was present myself, Mr. A. L. Merrill and we had a conversation with you concerning this case, do you remember the incident? A. I do.

Q. Do you remember that you told us that two days later after she had entered the hospital she told you that she was a fool for going out and getting drunk?

A. I did not make that statement.

Q. What statement did you make?

A. None in regard to that.

Q. You deny making any such statement?

A. Very definitely.

Q. Did she make any statement?

A. The only statement she made was to tell me what her name was immediately after entering the hospital.

Mr. Smith: That is all.

The Court: Just to make my ruling clear for the record, and the jury; the jury will disregard any question asked by counsel as being prejudicial in any way. [189]

#### Redirect Examination

By Mr. Coughlin:

Q. You testified earlier that you detected an alcoholic odor on Mrs. Newby, will you explain what you meant by that?

A. Well the only explanation I can make of that statement is that from the odor of the stomach



(Testimony of Dr. R. B. Lindsey.)

content and the breath, from my experience I would judge that there was an odor of alcohol present.

Q. Would that *meant* that she had drank intoxicating liquor?

Mr. Merrill: We object to that, it is very evident, and it is not a proper question, it invades the province of the jury.

The Court: Objection sustained.

Q. Will you explain further what you mean by an alcoholic odor? Does that necessarily mean that the odor would come from alcoholic beverages?

Mr. Smith: We object to the question as leading and improper redirect examination.

The Court: He may answer.

A. No sir.

Q. Do you mean to say Doctor that the odor did come from alcoholic beverage?

Mr. Smith. Objected to. The Doctor has fully answered that question.

The Court: He may answer. [190]

A. No sir.

Mr. Coughlin: That's all.

#### Recross Examination

By Mr. Smith:

Q. You say that you did detect the odor from the contents of the stomach? A. Yes sir.

Q. That would also indicate, in your opinion, that an alcoholic beverage had been drunk by the patient?

A. No, I would not make that statement.

(Testimony of Dr. R. B. Lindsey.)

Q. I asked for your opinion, what is that opinion?

A. I have no opinion in that regard.

Q. Did you give an opinion that it might mean there was alcoholic content in the stomach?

A. May I have that question please?

Q. I will ask the converse of that question. Would not that, in your opinion,—strike that,—Doctor, in your opinion might not the odor of alcohol from the contents of the stomach also mean that she had been drinking alcoholic beverages a short time before?      A. It could.

Q. That is your opinion?

A. My opinion is that the alcoholic odor could be from an alcoholic beverage or from alcohol whether a beverage or not.

Mr. Smith: That is all. [191]

#### Redirect Examination

By Mr. Coughlin:

Q. Does that mean that a person would have to drink something to have an alcoholic odor?

Mr. Smith: Objected to as repetition and leading.

The Court: I think I will let him answer.

A. Yes, I would say it did.

Q. Are there other things that a person could drink besides alcoholic beverages that would cause an alcoholic odor?

Mr. Smith: Objected to, the Doctor has fully answered that question on direct, and recross.

(Testimony of Dr. R. B. Lindsey.)

The Court: Sustained.

Mr. Coughlin: That's all.

Mr. Smith: Yes, that is all.

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## GEORGE H. NEWBY

being called as a witness on the part of the plaintiffs after being first duly sworn, testifies as follows:

### Direct Examination

By Mr. Davis:

Q. State your name.

A. George H. Newby.

Q. How old are you?           A. Thirty-five.

Q. Where do you live? [192]

A. Montpelier.

Q. What is your business?

A. I work for Morrison-Knudson Contractors.

Q. How long have you worked for them?

A. Since 1927.

Q. When were you married,—you are married?

A. Yes sir.

Q. When were you married?

A. May 18, 1930.

Q. To whom were you married?

A. Miss Avenell Tuescher.

Q. How many children did you have?

A. Two.

Q. What are their ages?           A. Six and eight.

Q. And what are their names?

(Testimony of George H. Newby.)

A. Richard Arlen and Patty Ann.

Q. What were the expenses of the last illness of your wife?

A. Doctor and nurse \$115.00,—the hospital and funeral expense \$268.00 and Doctor's expense \$115.00.

Q. How old was Mrs. Newby in September 1942?

A. Twenty-eight.

Q. What size was Mrs. Newby?

A. She weighed a hundred and five pounds, approximately.

Q. What kind of a looking girl was she?

A. A very, very good looking woman. [193]

Q. What kind of a house-keeper was she?

A. Very good.

Q. What kind of care did she take of the children?

A. Very good.

Q. What kind of care did she take of you?

A. I wouldn't ask for better care.

Q. What kind of cook was she?

A. A very good cook.

Q. How did you feel toward your wife?

A. She was the one woman I should keep if I could.

Q. Did you love her?

A. I did.

Q. Did she return your affection?

A. She did.

Q. What kind of care was taken of the children?

A. Very good care.

Q. Since the death of Mrs. Newby have you

(Testimony of George H. Newby.)

been able to have your children with you or to provide a home for them?      A. I have not.

Q. Where have the children been since then, and where are they now?

A. In the care of my wife's mother and they are still with her.

Q. Have you paid for that care?

A. Yes sir.

Q. How much have you paid? [194]

A. Seventy-five dollars a month.

Q. Where are they to continue to be kept?

A. With Mrs. Tuescher.

Q. That is your wife's mother?

A. Yes sir.

Q. Have you ever seen Mr. Donnelly?

A. Yes sir.

Q. When did you first see him?

A. Before noon on the Sunday following the accident.

Q. Where were you at the time of the accident?

A. Kemmer, Wyoming, working.

Q. When were you notified?

A. I was never notified. They knew I would be home Saturday night, that is the first time I knew about the accident.

Q. Where did *you* Mr. Donnelly at this time that you say you saw him?

A. I was returning to my brother-in-law's from the hospital. Just before you get there there is a Shell station and that is where I met him.

Q. Had you ever met him before?



(Testimony of George H. Newby.)

A. Previous to this my brother-in-law had met him and at this time we were walking to his home and we met Mr. Donnelly and he introduced himself to me.

Q. What did he say?

A. He introduced himself to me. He said, "I am Mr. Donnelly, [195] I am the manager of the Reynolds Tobacco Company for this District and I have come up to see about the wrecked car."

Q. Was anything said about your wife?

A. He asked how my wife was and I said she was very, very ill, and he asked if I had a good competent Doctor, and I said that I thought I had and he said "would you let me go and talk to the Doctor" and I said yes, or he seemed to be under the impression that I said yes, and he went and talked to the Doctor.

Mr. Merrill: We object to that as being a conclusion of the witness.

Q. Did he leave?

A. He left and talked to the Doctor.

Q. Were you there when he talked to the Doctor?

A. I was not.

Q. Did he come back and say that he had talked to the Doctor, after that?

A. I met him as he came out ahead of the Doctor.

Q. Did he say anything to you?

A. Yes sir.

Q. What did he say to you?

(Testimony of George H. Newby.)

A. He said "I think you have a very competent doctor".

Q. Was any statement made concerning Mr. Hair?  
A. Yes sir, there was.

Q. State what that was. [196]

A. Mr. Donnelly told me in the course of the conversation that he had got Mr. Hair out of these scrapes before and that there would be no reason to bring suit against Hair; there would be no chance to get anything against him, and he said "we are fully protected" and there was no use to bring suit.

Q. Was anything said about getting excited?

A. Yes sir, he told me not to get excited; that he had talked to Mr. Hair and he said as far as he could tell it was just an innocent ride, and for me not to get excited, that he thought everything would be all right.

Mr. Davis: That is all Mr. Newby.

#### Cross Examination

By Mr. Merrill:

Q. Mr. Newby were you at your home on the 10th day of September 1942?  
A. I was not.

Q. Or the evening of the 10th of September 1942?  
A. I was not.

Q. That was the night before the accident?

A. Yes sir.

Q. Where did your children stay that night?

A. I don't know.

Q. Did you make any inquiry?

(Testimony of George H. Newby.)

A. I did not.

Q. You knew that your wife had been away all night? [197]

A. I didn't know it at that time.

Q. You know it now?

A. I do not know it now.

Q. You made no inquiry as to when she left home? A. No, sir.

Q. Or as to where the children had stayed that night? A. No, sir.

Q. Why didn't you?

A. I figured that they were with their mother. I didn't see any reason for any inquiry.

Q. Didn't you make any inquiry as to why she was out with Mr. Hair?

A. If she was out with him she did it under her own volition.

Q. You thought she had a right to go out with him and to be out all night?

A. I don't know she was.

Q. Do you think it would be proper for her to be out with him all night? A. I do not.

Q. Why didn't you make inquiry as to how long she had been with him and where she had been?

A. She was too sick to ask her.

Q. I didn't mean for you to ask her. Did you make any inquiry as to where she had been when you learned that she had been injured on the highway between Soda Springs and Montpelier? [198]

A. Certainly I asked.

Q. What did you learn?

(Testimony of George H. Newby.)

A. I didn't learn anything.

Q. Who did you ask?

A. My brother-in-law.

Q. He didn't know? A. He didn't know.

Q. Did you ask anyone else? A. No, sir.

Q. Didn't make any further inquiry?

A. No, sir.

Q. Never tried to find out why she went with Hair? A. No.

Q. Never tried to find out when she went with him? A. No, sir.

Q. Never tried to find out how long she had been gone? A. No, sir.

Q. That was her own affair? A. Yes, sir.

Q. If she wanted to run out like that, she could do so?

A. No, I wouldn't think that would be right if she did.

Q. What did you mean when you said you thought it was her own affair?

A. I wasn't there to say she couldn't.

Q. How long had you been away?

A. I left the apartment at three o'clock Monday morning.

Q. The Monday before the accident? [199]

A. Yes, sir.

Q. The accident was on Friday afternoon?

A. Yes, sir.

Q. How much of the time had you been away during the Summer, would you say half of the time?

A. About one-third of the time.

(Testimony of George H. Newby.)

Q. Where had you been?

A. I lived in Tennessee, she was with me then, and I returned to Montpelier, Idaho, in the latter part of July, and from there to Echo, and she went over to visit her brother and she returned to Geneva a week from that date.

Q. When was that date?

A. I wouldn't know for sure.

Q. When did you establish residence in Montpelier?

A. Twenty-eight days before this accident.

Q. Where did you have your residence?

A. The Downing apartments.

Q. Who operates those apartments?

A. They belong to Mr. Downing and the first name of the man running them is Jack.

Q. Did he ever talk to you about your wife residing there?

A. No he never did. I met him only once when I paid the rent to him.

Q. Where were the children when you returned?

A. With my brother-in-law and his wife.

Q. Did you ask how long they had been with them? [200]

A. They had been with them from the night before.

Q. The night before?

A. This was on Saturday and they had been with them since Friday evening.

Q. When did you come home?

A. Saturday evening at four o'clock.



(Testimony of George H. Newby.)

Q. Where did you find the children?

A. At Russel Tuesher's.

Q. How long had they been with them?

A. From the Friday before I got home. The day before I got home.

Q. What time Friday did they go there?

A. I don't know.

Q. You never asked?

A. No. We only lived a few blocks away and they are there quite a lot of the time.

Q. You don't know where they were Thursday night?

A. No, sir.

Q. Nor Friday morning?

A. Yes, I think they were at Russell's Friday morning.

Q. But you never made inquiry who took care of them the night of the 10th or the morning of the 11th?

A. No, sir.

Q. Never made inquiry as to when your wife left them there?

A. No, sir. [201]

Q. Now, you said that Mr. Donnelly told you not to get excited.

A. That's right.

Q. He told you that in response to your threat to kill Mr. Hair?

A. I don't remember that I made that threat.

Q. Didn't you tell Mr. Donnelly if your wife died that you would kill Hair?

A. No, I don't remember making that statement.

Q. And that is when he told you not to get excited?

A. I don't remember making that statement.

(Testimony of George H. Newby.)

Q. Then why did he tell you not to get excited?

A. I was nervous and upset at the bad illness of my wife.

Q. Was that before he had been to the hospital of after?      A. Before.

Q. That was the entire conversation that you have purported to relate?      A. No, sir.

Q. Did you have two conversations?

A. Yes, sir.

Q. Where was the conversation in which you have related certain statements as having been made?

A. That was before,—now, let's see, which statement do you mean?

Q. The ones you stated into the record.

A. That could have been at both, some of it at both times.

Q. Where did he tell you not to get excited? [202]

A. At the service station.

Q. Who was present?

A. Russell Tuesher, Mr. Donnelly, Mr. Hair and myself.

Q. Who was present when Mr. Donnelly said in substance and effect that he had gotten Hair out of scrapes before?

A. Russell Tuesher and myself.

Q. When was that?      A. In the afternoon.

Q. Where did it occur?

A. At the Police station.

Q. Why were you there?

(Testimony of George H. Newby.)

A. They had come to try and get Hair released so he could go home.

Q. What was the conversation after you had told Mr. Donnelly to go to the Doctor and he had gone to the Doctor?

A. He said "I think you have a very competent Doctor" and I said "Did the Doctor tell you there was any possible chance for her to recover" and he said "very much so".

Q. That was all of that conversation?

A. Yes, sir.

Q. Did you talk to him later? A. Yes, sir.

Q. Where? A. At the police station.

Q. And that was the third conversation?

A. Yes, sir. [203]

Q. Was it at that conversation that Mr. Donnelly made the remark that you have testified to?

A. What remark do you refer to?

Q. That was at the service station.

A. Which conversation?

Q. About Hair being in scrapes before?

A. Mr. Donnelly was at the police station.

Q. Who was present?

A. Donnelly, Hair, Mrs. Hair, Russel Tuesher and myself, that's all I remember.

Q. Was that at the time all those were present?

A. Yes, sir.

Q. That you had the conversation in which he said that Hair had been in scrapes before and he had gotten him out? A. That's right.

(Testimony of George H. Newby.)

Q. And there was no use of suing?

A. Yes, sir.

Q. That was in the presence of these people?

Q. We were off by ourselves.

Q. Mr. Hair was there? A. Mrs. Hair.

Q. Didn't you say that Hair was there?

A. I did not.

Q. Mr. Donnelly was there?

A. Mrs. Hair, myself, Russell Tuesher, Mr. Donnelly, the Chief of Police and Mr. Bunderson. [204]

Q. It was there,—withdraw that—they were all in the room? A. Yes, sir.

Q. It is a small room? A. Not small.

Q. They were all there together?

A. Yes, sir.

Q. Was anyone else talking when you were talking to Mr. Donnelly? A. No.

Q. So you have no reason to think the rest of them couldn't hear your statement?

A. We were talking low.

Q. There was no reason to think *they* they couldn't hear your statement?

A. No, I don't suppose there would be.

Q. They may have heard it, if it was made.

A. They may have.

Mr. Merrill: That is all.

#### Cross Examination

By Mr. Black:

Q. You and your wife have been living together all the time since your marriage?

A. Yes, we have.

(Testimony of George H. Newby.)

Q. Had you separated on the basis that you were not going to live together any more?

A. No, sir. [205]

Mr. Black: That is all the questions, I have. No, if I may I believe I will ask a couple more.

The Court: Go ahead.

Q. Prior to living at Montpelier where did you live? A. Indiana.

Q. For how long? A. Five years.

Q. What town? A. Linton.

Q. Just before you came to Montpelier?

A. No.

Q. Just previous to coming to Montpelier where had you been living? A. Bristol, Tennessee.

Q. How long had you lived there?

A. Went there in February and left there in July.

Q. In 1942? A. That's right.

Q. Prior to that where did you live?

A. Anderson Ranch Dam, Boise, Idaho.

Q. How long did you live there?

A. We went there in October and left there in February.

Q. Your wife live there with you?

A. Yes, sir. [206]

Q. You had established a temporary residence at Montpelier.

A. We established a residence there for the children to go to school there.

Q. Had you resided in Montpelier before that time?



(Testimony of George H. Newby.)

A. Yes, sir, I was married in Montpelier.

Mr. Black: That is all.

### Redirect Examination

By Mr. Davis:

Q. Mr. Davis: May I ask a question that should have been asked on direct examination?

The Court: Yes, you may.

Q. How old is Richard? A. Ten.

Q. How old is Patty? A. Eight.

Mr. Davis: That is all.

Mr. Merrill: Nothing more.

Mr. Black: That is all.

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### ROSETTA TUESHER,

being called as a witness on the part of the plaintiff,  
after being first duly sworn, testifies as follows:

### Direct Examination

By Mr. Davis:

Q. State your name please?

A. Rosetta Tuesher.

Q. Where do you live? [207]

A. Geneva.

Q. How many children have you?

A. Eight.

Q. Mr. Merrill: Objected to as immaterial.

The Court: She has answered and the answer may stand.

Q. Did you have a daughter Avenell?

(Testimony of Rosetta Tuesher.)

A. Yes, sir.

Q. Was she the wife of Mr. Newby who just testified?      A. Yes, sir.

Q. How old was Avenell at the time she passed away?

A. She passed away on the 16th of September and she was eighteen in the August before that.

Q. Eighteen?

A. Twenty-eight is what I meant to say.

Q. How many children did she have?

A. Two.

Q. Where are they now?      A. With me.

Q. Do you get paid for caring for them?

A. Yes, sir, seventy-five dollars a month.

Q. Who pays you?

A. Mr. Newby and he comes and stays with them when he can, too.

Q. Did you have occasion to visit Avenell's home at different times after she was married? [208]

A. I visited her at different times whenever it was close enough to go.

Q. What kind of a house-keeper was she?

A. A fine house-keeper.

Q. What kind of care did she take of the children?      A. Fine.

Q. When the children came to you what was their demeanor or behavior?

A. They were fine children.

Q. With reference to the exhibit now being shown you by the Bailiff, what is that?

A. It is my daughter.

(Testimony of Rosetta Tuesher.)

Q. Is that a good likeness of her?

A. Yes, sir.

Q. Is that a good likeness of her at the time just previous to the time she passed away?

A. She was a little older than when this was taken.

Q. Did she still look like that?

A. Yes, sir.

Mr. Davis: We offer this exhibit in evidence.

Mr. Merrill: We object to it upon the ground that it is immaterial and does not tend to prove any issue in this case. It is designed to prejudice the jury and no foundation is laid for its admission.

[209]

The Court: I cannot see that it is very material, however, I will let it in.

Mr. Davis: Now, Mr. Bailiff, will you hand it to the jury.

Mr. Merrill: I would like the record to show that we object to its being shown to the jury.

Q. Where did your daughter go to school?

A. Geneva to the eighth grade and to Montpelier to high school, Mr. Winter was the Superintendent.

Q. I thought you told me that she went to a seminary.

A. Yes she goes to a seminary in connection with the high school, there is a few *point* in addition they get.

Mr. Davis: That is all Mrs. Tuesher.

Mr. Black: No questions.

Mr. Merrill: No questions.

L. R. DONNELLY,

being called on cross examination under the statute, by the plaintiff, after being first duly sworn, testifies as follows:

Cross Examination

By Mr. Davis:

Q. State your name?

A. L. R. Donnelly.

Q. Where do you reside? [210]

A. Salt Lake City, Utah.

Q. By whom are you employed?

A. R. J. Reynolds Tobacco Company.

Q. How long have you been employed by them?

A. Approximately fourteen years.

Q. What is your position with the Company?

A. Division manager of the Salt Lake City Division.

Q. Is part of the Idaho territory in your division? A. Yes, sir.

Q. Did Mr. Hair work under you?

A. Yes, sir, he did.

Q. For how long?

A. He started to work, if I recall, in 1937.

Q. What counties or towns in Idaho were in his territory?

A. His headquarters was Pocatello, his territory extended north to the Montana line, extended west almost to American Falls, a little this side, and south to the Utah line and it extended east to the Wyoming line.

Q. That was true of all of the time he worked for you?

(Testimony of L. R. Donnelly.)

A. No, he started in Salt Lake City. At one time his territory was in Salt Lake City, Utah.

Q. But all of the time he was in Idaho he had the territory you have referred to?

A. Yes, sir.

Q. Bear Lake County was in his territory? [211]

A. Yes, sir.

Q. Clark County was in his territory?

A. Yes, sir.

Q. The town of Dubois? A. Yes, sir.

Q. Did you have occasion to come to Pocatello on or about April 15, 1939?

A. I think I came to Pocatello on April 17th.

Q. What was your purpose in *come* here?

Mr. Merrill: I object to that as immaterial, incompetent and irrelevant for any reason, having nothing to do with this accident. Nothing at all to do with the controversy involved in this case.

The Court: Does counsel intend to connect this up?

Mr. Davis: Yes, your Honor.

The Court: If it is not connected up I will strike it later.

Mr. Merrill: Now, we furthermore want to find out what his idea is in connecting this up. If it is for the purpose of attempting to prove any allegation in paragraph seven we ask to be heard on the legal aspect of that.

The Court: Is that the purpose?

Mr. Davis: That is the purpose. [212]



(Testimony of L. R. Donnelly.)

The Court: I will excuse the jury for a few minutes.

(Jury excused.)

The Court: I take it that the question is propounded under the last part of paragraph seven of the complaint, "notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instruction."

Mr. Davis: Yes, your Honor.

The Court: And that is what your objection goes to.

Mr. Merrill: Yes, that allegation is just innuendo. There isn't an allegation in the whole complaint that Hair was an habitual, reckless and careless driver. They take these words from the case of Department of Water and Power v. Anderson 95 Fed. (2) page 577, and if your Honor cares to examine that case you will find that before the words "who were directly over him" and following the words "said employers" there are stars indicating a considerable portion has been left out.

The Court: How would the employer receive notice except through the manager. It is conceded here that Mr. Donnelly is the manager, the district manager of the Reynolds Tobacco Company. Of course, the question we have presented here is not now so much a matter of evidence but pleadings, it is an attack on the pleadings. [213]

(Testimony of L. R. Donnelly.)

Mr. Merrill: And of course, the showing must conform to the law.

The Court: I take it that your objection here is in the way of a rather technical objection because the complaint does not allege what you claim that it does not allege. However, the liberality with which the pleadings are considered under the rules, take the allegation: Notwithstanding that at all of said times the said tobacco company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instruction. I can see that the complaint may have been better if they had also alleged that he was reckless, however, I don't think anybody could be misled.

Under the case read or referred to by Mr. Merrill these were questions which were taken care of by instructions to the jury. We don't know how far the *plaintiff* are going, what they are going to do here.

Mr. Smith: Isn't it true that Your Honor should force the plaintiffs to make the showing which they have started out to make. We want to know if their showing is going to extend to this one accident, if they have two, or if they have more. If [214] they didn't have more than one or two then their showing cannot stand in face of the rulings of the Federal Courts. In other words, it would be an error for Your Honor to allow that

(Testimony of L. R. Donnelly.)

showing in the face of the Federal cases we have.

The Court: At this time it is impossible to tell how far the evidence will go. The objection is overruled at this time. However, I will say that there is one serious question in the Court's mind. When you get outside of the facts themselves, whether the Court record would be admissible. Before that Court record is introduced I would like to hear from counsel. I don't mean that the acts of negligence would not be admissible, but the question of the conviction, whether just the Court record of the conviction would be admissible. However the acts of negligence and the driving recklessly I don't think there would be any question about that, I am just a little in doubt about the admissibility of the Court record. Have you any authority on that.

Mr. Davis: The rules say that the way to prove a record is by copies. If a man is charged and if a conviction is in the Court record, certainly that would be the highest proof you could have on that. [215]

The Court: The objection will be overruled, except as to this one question which I suggested and I will rule later on that. I think it would have to be submitted to the jury under proper instructions, or taken away later. However, I cannot take matters from the jury merely on supposition.

Mr. Merrill: At this time we would like to reserve the right to make a motion to strike the show-

(Testimony of L. R. Donnelly.)

ing that he has indicated that he is going to make, and take an exception to the ruling of the Court.

The Court: I will ask you to get along with *you* testimony up to the record of conviction.

Mr. Davis: I will not make an offer at this time.

The Court: Then you may make your motion to strike later.

Mr. Black: I would like exceptions to your rulings for my client.

The Court: Yes, that is understood.

Mr. Merrill: And of course, to our clients, we would like exceptions.

The Court: Yes, it is so understood to your clients also.

(Jury called and Mr. Donnelly recalled.)

[216]

Q. Mr. Donnelly do you recall the last question?

A. Yes, I understand the question, but *is* has been so long ago, it is rather vague. I came to Pocatello quite often. I think I came to investigate an accident.

Q. An accident by whom? A. Mr. Hair.

Q. An accident in which the Company truck was involved? A. That's right.

Q. Did you find there had been an accident in which that truck was involved? A. Yes sir.

Q. Did you find that a person had been killed in that accident?

(Testimony of L. R. Donnelly.)

Mr. Merrill: We object; that fact if it is a fact, there are other witnesses who know of it and it can be proved in the regular way.

The Court: He may answer.

A. Yes sir, I found out that there had been a person killed.

Q. Did you find out what time of day that accident happened?

Mr. Merrill: Objected to as leading.

The Court: He may answer.

Mr. Black: May it be understood that we join in all these objections without repeating it each time?

The Court: Yes. [217]

A. There is not doubt but that I found out the time of day it was, but it has been so long, and due to the length of time since that I don't remember.

Q. You found out it was not at a time he was engaged in Company business? A. Yes sir.

Q. Previous to this time you had instructed Mr. Hair not to haul guests in the truck?

A. Yes sir.

Q. You had instructed him not to use the car except on Company business? A. Yes sir.

Q. You found he had hauled a guest contrary to the Company instruction? A. Yes sir.

Q. And you found out that he was using the car not on company business?

A. That is correct.



(Testimony of L. R. Donnelly.)

Q. Did you go to the police station to *may* any investigation about this?

A. Yes sir, I made a thorough investigation of the accident.

Q. You made a written report to your Company?      A. Yes sir.

Q. You have read the deposition or a copy of the deposition of the General Sales Manager and Director Mr. Darr?      A. I have [218]

Q. You have seen in there a copy of a letter you wrote?      A. Yes sir.

Q. Mr. Donnelly, you were present at the time of the trial at the time Mr. Hair was prosecuted for the death of the person in that accident?

A. I was present part of the time.

Q. Part of the time during the trial?

A. During the trial, part of it, yes.

Q. You heard the testimony of the witnesses?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and improper cross examination under the rules.

The Court: Overruled.

A. I naturally heard the testimony.

Q. You heard Mr. Smullen the policeman testify?      A. Yes sir.

Q. You heard him testify that Mr. Eckersley was in the car with Mr. Hair?

A. Before I answer that I would like to make an explanation.

The Court: You may explain.

A. When I found that Mr. Hair had hauled a

(Testimony of L. R. Donnelly.)

passenger naturally I investigated the accident, and what I found out was that Mr. Hair had taken his wife and child and neighbor to the train, the early morning train, which necessitated him having a car, and that wasn't during work hour, the accident took place when he was returning. [219]

Q. It was necessary to make that explanation in order to say whether Mr. Eckersly was in the car with Mr. Hair or not?

A. I want to explain.

Q. Well, you found Mr. Eckersly was in the car at the time he hit Mr. Myers?

A. Yes sir.

Q. There were two different times he had a guest in the car? A. No sir.

Q. His wife was with him? A. Yes sir.

Q. But his wife was not with him at the time of the accident?

A. No, but I think Mr. Eckersly was.

Q. And did you hear that same evening that Mr. Hare had the Company truck at the El Rio and at different places around town?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. I didn't hear that he used the car other than as I explained.

Q. You didn't hear that in the trial?

A. No sir, I don't recall hearing that at the trial.

Q. You don't remember hearing it?

(Testimony of L. R. Donnelly.)

A. No sir.

Q. You recall that you and the R. J. Reynolds Tobacco Company were sued by reason of that accident, in the District Court? [220]

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

The Court: Overruled.

A. Yes sir.

Q. You continued to permit Mr. Hair to work on your recommendation after you knew that he had violated the instructions both as to hauling guests and to using the car, or truck?

A. May I explain that?

Q. You continued to permit Mr. Hair to work on your recommendation after you knew that he had violated the instructions both as to hauling guests and using the car when not on company business?

The Court: You can answer that without any explanation, whether you did or did not.

Q. You recommended that he be allowed to continue? A. Yes sir.

Q. I am calling your attention to the deposition of E. A. Darr taken on behalf of the defendants which I asked you if you had read, now will you please look at that, and calling your attention to page 32 of the deposition is that a copy of the first report you made to the company after you came to Pocatello, at the time of this accident?

Mr. Merrill: That is objected to as incompetent, irrelevant and immaterial, counsel is asking him to

(Testimony of L. R. Donnelly.)

refer to an exhibit not in evidence and [221] it purports to be a part of a deposition not offered and until it is offered and considered by the Court it would be highly improper for the witness to be interrogated in reference to it. It is a deposition of another witness, and not of this witness.

The Court: He may answer.

Mr. Black: May I dictate an objection to this line of testimony.

The Court: Yes, you may do so.

General Black: Defendant Hair objects to this line of testimony and the introduction of any evidence as to the incident that is referred to for the following reasons: That there is no allegation in the complaint sufficient upon which such evidence could be admissible as against this defendant, and Second; that the evidence sought to be elicited is evidence of a separate and distinct transaction and could not in any way be connected with and is no part of the act in question in any sense; no part of the act with which this defendant is charged in this case at bar. That if the evidence regarding the incident were allowed to be introduced it would be only partly introduced, and there would only be a smattering of conclusions and statements without the entire record being presented to the Court; and therefore it would permit an inference to be drawn therefrom which would not be proper as to [222] this defendant's liability in this case. It would be prejudicial and could not effect the question of whether or not under this charge, this

(Testimony of L. R. Donnelly.)

defendant did recklessly or otherwise as charged, drive the car in this particular case; and this defendant should not be prejudiced by such evidence, which would be incompetent if he were being tried alone, by reason of the fact that there happens to be other defendants in this case.

Mr. Merrill: We adopt that objection and add that the same is not sufficient at law, and one incident is not sufficient to prove the allegation in paragraph 7.

The Court: The evidence will be admitted. The evidence introduced in regard to the knowledge of the Reynolds Tobacco Company and Donnelly is a matter that should not be considered by the jury as against the defendant Hair. It is admitted for the purpose of showing knowledge of the Reynolds Tobacco Company and Donnelly.

Mr. Merrill: May we have an exception?

The Court: Exception granted.

A. This is a copy that I made and sent to the Company but I cannot tell whether it is the first copy or not.

Q. This is the report you made to the Company?  
A. Yes sir. [223]

Q. Turn to the next instrument and tell me if you know what that is.

A. Part of the same letter.

Q. The next letter or copy, do you know what it is?

A. From reading it I can tell you what it is, but I never saw it before.



(Testimony of L. R. Donnelly.)

Q. You never saw it before? A. No sir.

Q. You don't know what it is?

A. No, I don't know what it is.

Q. Showing you there, Mr. Donnelly, a letter in the deposition, whose signature appears on that?

A. My own signature.

Mr. Merrill: We object to that on the ground that there appears no signature, and it is incompetent, irrelevant and immaterial.

The Court: Objection overruled. He may answer.

A. It is a photostatic copy of my signature.

Q. That is your signature? A. Yes sir.

Q. What is that signature attached to? Is that a report you made to the Company?

A. It is a report to my company.

Q. Now, Mr. Donnelly, calling your attention,—turn on now to those two photostatic copies of the reports. Do [224] you know in whose hand writing that is in? A. No, I cannot say.

Q. You know Mr. Hair's signature?

A. I cannot see any signature.

Q. Turn to the next page. A. I have it.

Q. Do you know Hair's signature?

A. Yes sir, it is Hair's signature.

Q. Now turn and see if there is another one signed by Mr. Hair. A. That is right.

Q. Both of those you mailed to the Company and inclosed them with the letter that is yours?

A. No sir.

(Testimony of L. R. Donnelly.)

Q. You didn't send them to your Company?

A. I didn't mail them.

Q. Did you see Mr. Hair make them out?

A. I saw him make one copy.

Q. You looked it over when he made them out?

A. I looked it over I guess.

Q. Where did you see him make it out?

Mr. Merrill: Objected to on the same grounds.

The Court: The same ruling.

A. In the Chief of Police' office at Montpelier, Idaho as I recall it. [225]

Q. You knew, Mr. Donnelly, after you attended the trial, that Mr. Hair was convicted, did you not?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and not the best evidence. On the further ground that it is prejudicial and not within the pleadings.

The Court: That objection is sustained.

Q. Mr. Donnelly, you knew what he was being tried for, did you not?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and prejudicial and not the best evidence.

The Court: He may answer.

A. Well, to tell the truth I was confused as to what he was being tried for.

Q. Did that report show he was arrested and out on bond?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial.

Mr. Davis: I will withdraw the question, if

(Testimony of L. R. Donnelly.)

there is any question the reports show for themselves.

The Court: Very well, then the Court will not have to rule on that objection.

Mr. Davis: We offer in evidence plaintiff's exhibit being heretofore identified as bearing Mr. Donnelly's signature. [226]

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and does not tend to prove or disprove any issue in this case.

The Court: It may be admitted.

Mr. Davis: Now, we offer in evidence exhibit 12 being two pages and being a photostatic copy of the report signed by R. D. Hair.

Mr. Merrill: We object on the same grounds.

The Court: It may be admitted.

Mr. Davis: We now offer in evidence exhibit 13 which has been marked for identification and marked a corrected report, and it is also signed by R. D. Hair, and has been identified by Mr. Donnelly.

Mr. Merrill: The same objection as made to the previous exhibits 11 and 12.

The Court: It may also be admitted.

Mr. Davis: I believe that is all of this witness.

### Redirect Examination

By Mr. Merrill:

Q. You testified that you re-employed or employed Mr. Hair, or permitted him to continue in your employment after the accident in April 1939.

A. Yes sir, that is correct.

(Testimony of L. R. Donnelly.)

Q. And at that time you asked permission to explain that [227] answer, now, will you explain why and under what circumstances you permitted his continuance in the employ of that company?

A. While making the investigation I went and called on the police and also called on some of the dealers, asking their attitude toward Mr. Hair. I also attended the trial. It was very apparent to me that what happened to Mr. Hair on that fatal morning could have happened to anyone in the Court room here; also the fact that the jury recommended leniency for Mr. Hair, that is what I based my opinion on.

Q. Was there any instructions given to Mr. Hair in respect to that?

A. Yes sir, very emphatic.

Q. What were they?

A. We have a car agreement that Mr. Hair signed. Before an employee is allowed to operate a car, or an employee is hired he is gone into very thoroughly, as to whether he is competent to drive.

Q. What did you find with respect to Hair?

A. I found that he was a competent driver.

Q. Continue.

A. After he signed this car agreement, I explained it in detail, and after the accident I sat him down in the hotel room, and also my superior officer was with me at that time, and I explained to him and his wife that [228] there would be no more passengers in that car, and if it ever was found out that

(Testimony of L. R. Donnelly.)

he carried another passenger he would be discharged immediately.

Q. And did you advise him of that if he carried passengers again he would be discharged immediately? A. Yes, sir.

Q. And did he sign the agreement of the character you mentioned when he took the car of his employer? A. He did.

Q. I hand you defendant's exhibit 14 and ask you what it is?

A. That is the car agreement signed by R. D. Hair and given to him by myself, the property of the company.

Q. What is the date of this?

A. The 8th of February 1942.

Q. Does that have reference to the car involved in that accident and in this case, the Chevrolet panel truck?

A. I believe this car was given to Mr. Hair after his accident.

Q. Does that have to do with the car involved in the accident near Montpelier?

A. Yes, it does.

Q. Did Mr. Hair sign that? A. He did.

Q. In your presence? A. Yes, sir. [229]

Q. It was pursuant to that agreement that the car he was driving at the time of the Montpelier accident was received by him?

A. Yes, sir, that is correct.

Mr. Merrill: We offer in evidence defendant's exhibit 14.



(Testimony of L. R. Donnelly.)

Mr. Davis: No objection.

The Court: Admitted.

Mr. Merrill: I would like to read it at this time.

The Court: Yes, you may read it.

Mr. Merrill: "Salesman's agreement to whom car is delivered. R. J. Reynolds Tobacco Company, Winston-Salem, N. C. This will certify that there was delivered to me this 8 day of February 1942, at Salt Lake City Utah, one Sedan Delivery Chevrolet 6 1941 Model A. A. Sedan delivery, motor number A A 517606, Silver tag number 9020, with the regular and special equipment, as fully explained in your letter of instructions which I have carefully noted, and which I do hereby agree to observe in operating car, and same will be followed to the best of my ability in making my services of more value as a salesman, while the car is in my charge. I further agree that I will be responsible for the car, its parts and equipment, and upon request will turn same over to you, your successor, or a duly authorized representative [230] of R. J. Reynolds Tobacco Company. I further agree that I will not use the car for any other purpose than that of furthering R. J. Reynolds Tobacco Company's business as directed by my Division Manager. I understand that under no consideration am I to permit anyone save and except an employee of R. J. Reynolds Tobacco Company to ride with me in the said car. R. D. Hair Witness L. R. Donnelly." Under Mr. Hair's signature are the words, Salesman sign here, and under Mr. Donnelly's, Division Manager's signature.

(Testimony of L. R. Donnelly.)

Q. Now, Mr. Donnelly, was there any violation of any kind or character on the part of Mr. Hair of the rule against carrying guests, that ever came to your knowledge, if any ever occurred, from the time that you advised him in the hotel that he could continue in your employment, up until the time of the accident of September 11, 1942?

A. No, sir, no occasion and no time that I knew of anything like that, no time that I knew of when he carried any passengers.

Q. During that period of time what was his record as a driver?

A. Very good. The Company had sent him letters every year, stating that he had no accidents and sent him an emblem every year.

Q. Did he have any accident of any kind or character between [231] the one in 1939 near, or in Pocatello, and the one near Montpelier in September 1942?

A. None, no sir.

Q. Did any information of any kind or character ever come to you that he had hauled any guest in his car?

A. The only one I knew of was that one when I said that he carried a passenger.

Q. That was in Pocatello in 1939, that was the time that you considered discharging him?

A. Yes, sir.

Q. And it was after that that you had the conversation and made it plain to him that he would be discharged if he ever hauled a guest again?

A. That is correct.

(Testimony of L. R. Donnelly.)

Q. What was done when you found that he had Avenell Newby in the car as his guest?

A. He was discharged.

Q. When was he discharged?

A. The 12th of September, the moment I got there.

Q. Is he in your employ now?

A. He is not.

Q. Has he been since the 12th of September 1942?

A. He has not been.

Mr. Merrill: That is all.

#### Recross Examination

By Mr. Davis: [232]

Q. Mr. Donnelly, you just made a statement that he had no accident or trouble of any kind or character during this certain time, do you mean to say that he didn't have or that you didn't know it?

A. I didn't know of any accident to the car and naturally I would have, he turned in all the expenses, and he turns in the expenses to the car.

Q. He makes a report, and if he was convicted of reckless driving and had a guest in the car, you would have known that? A. Not necessarily.

Q. Now, that exhibit that you delivered to him in February 1942. You had delivered exactly the same thing when you delivered the car that he had in the accident in Pocatello? A. Yes, sir.

Q. And he had already signed the same statement before? A. Yes, sir.

Q. You said that you didn't know the outcome of the trial.

(Testimony of L. R. Donnelly.)

A. If I said that I didn't mean to say it.

Q. You told counsel that the jury recommended leniency.

Mr. Merrill: He has not so testified.

The Court: I think he testified to that in answer to your question. [233]

Q. They had convicted him when *the* recommended leniency had they not?

Mr. Merrill: Objected to as calling for a conclusion.

The Court: The objection is sustained to this question.

Q. After he had violated the instructions that you had given him and that you have introduced here, you went together with one of the officers of the Company, and took Mr. Hair to the hotel and had a good talk with him?

A. Yes, sir.

Q. Was he a good salesman?

A. Very good.

Q. And you wanted to keep him on for that reason?

A. Not wholly.

Q. Did you have any suspicion that if he violated the instructions once that he might violate them again.

A. I naturally didn't think so or I wouldn't hire him back.

Q. You naturally didn't think he would violate them in the first place or you wouldn't have hired him then would you?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and argumentative.

(Testimony of L. R. Donnelly.)

The Court: He may answer.

A. No, sir. [234]

Q. What made you think after he violated them once, and you and the officer of the Company had this heart to heart talk with him, what made you think that and having him sign this exhibit 14 would be more impressive than the first one was?

Mr. Merrill: We object to that question, it was not at that time that he signed this exhibit 14.

The Court: He may answer as to what the fact is.

A. I believed under the circumstances after investigating the accident that Mr. Hair was not trying to violate the rules, although he did violate a company rule by taking his wife to the train, but he didn't have any transportation to take her to the train that morning.

Q. And that is your answer to the last question?

A. That is my answer.

Q. He had a good record as a driver after this time that Mr. Myers was killed?

A. That is true.

Q. Did he have a good record in Clark County as a driver?

A. I imagine all over the territory.

Q. That was in his territory? A. Yes, sir.

Q. And under your supervision?

A. Yes, sir. [235]

Q. Did he have a record of having guests in his car? A. Not that I know of.

Q. Did you try to keep advised?

A. Yes, sir.



(Testimony of L. R. Donnelly.)

Q. After you put him back in your employ, did you take steps to ascertain if he was obeying your instructions?      A. Yes, sir.

Q. You tried to keep advised about it?

A. Yes, sir.

Mr. Davis: That is all.

Mr. Merrill: Nothing further.

Mr. Black: No questions.

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SID CLOSE,

being called as a witness on the part of the plaintiff,  
after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. Sid Close.

Q. Where do you live?      A. Dubois.

Q. Clark County, Idaho?      A. Yes, sir.

Q. Do you hold any official position there?

A. Sheriff.

Q. How long have you been sheriff? [236]

A. Four and a half years.

Q. Do you know the defendant Mr. Hair?

A. Yes, sir.

Q. In the year 1939 did you see him in Clark County?      A. Yes I did.

Q. Did you have occasion to see him when he was driving a motor vehicle?      A. Yes, sir.

(Testimony of Sid Close.)

Mr. Merrill: We object to this upon the ground that there is no proof that any incident ever came to the knowledge of Mr. Donnelly and/or the Reynolds Tobacco Company, and therefore it would be wholly immaterial.

The Court: This is admitted as far as the defendant Hair is concerned but the jury will not consider it as to Donnelly and the Reynolds Tobacco Company unless it is connected up.

Mr. Black: May our objection be considered as to this, on behalf of defendant Hair?

The Court: Yes, and it is overruled.

Q. Did you see him driving a motor vehicle in Clark County?      A. Yes, sir.

Q. What kind of a motor vehicle was that?

A. A panel truck.

Q. Did it have any signs on it? [237]

A. Yes, sir.

Q. What was the sign or signs?

A. Reynolds Tobacco Company.

Q. Did you have occasion to see the truck and Mr. Hair in 1940?      A. Yes, sir.

Q. And did you have occasion to see him and the truck in Clark County in 1941?

A. I cannot say in 1941.

Q. Have you had occasion to see it in 1942?

A. I don't remember.

Q. On the occasion on which you saw this truck and Mr. Hair, was he accompanied by anyone?

A. He was.

Q. Man or woman?      A. Woman.

(Testimony of Sid Close.)

Q. How many times did you see him accompanied by a woman?

A. Several times, I cannot tell the number.

Q. Would it be six or seven?

A. Yes it would.

Mr. Black: I move to strike that answer for the purpose of an objection.

The Court: He has answered the question and the answer may stand.

Q. Did you have an occurrence up there in which any charge was placed against Mr. Hair for driving?  
[238]

A. Yes, I did.

Mr. Black: I object to that as being incompetent, irrelevant and immaterial, and not tending to prove any matter in issue here.

The Court: Overruled.

Mr. Black: I move to strike the answer.

The Court: It may stand.

Q. Just state what you saw Mr. Hair do and what was done.

Mr. Black: We object to that as incompetent, irrelevant and immaterial, not tending to prove any issue here.

The Court: I think he can answer the first part of the question.

Mr. Merrill: May it be understood that it is introduced against only the defendant Hair and not as against Donnelly and the Reynolds Tobacco Company.

(Testimony of Sid Close.)

The Court: That is the Court's ruling until the matter is connected up.

Mr. Black: I think our objection goes to each question.

The Court: You may have that understanding.

Q. What did you do?

A. The prosecuting attorney came over to the office—— [239]

Mr. Black: The same objection and also this answer is not responsive, we object to his stating what someone else did.

The Court: What you did and what you saw.

A. What I done. This man was going up the road from one side to the other and I got in my car and went about a mile west of Dubois and picked the gentleman up and brought him back for reckless driving.

Q. Was anyone,—strike that,—was there a passenger with him at that time?      A. Yes, sir.

Q. Was it a man or woman?      A. Woman.

Q. What was the name that he gave at that time?

A. He gave his name as B. R. Hair.

Q. It was this same gentleman who is sitting here (indicating)?

A. Yes, sir, the same gentleman.

Q. Have you had occasion and did you observe Mr. Hair and his driving in your County from time to time?

Mr. Black: Of course, we have the same objection to this.

(Testimony of Sid Close.)

The Court: Yes, and the same ruling. Go ahead.

A. Yes, I have saw the man driving when I thought he was intoxicated, two or three times before that. [240]

Q. What would you say as to whether he was a reckless driver?

A. I would say he was a reckless driver.

Mr. Black: I move to strike that as a conclusion of the witness and not evidence of a fact.

The Court: I think it may be stricken. He may state the facts and then the jury may determine whether he was a reckless driver.

Mr. Davis: That is all.

### Cross Examination

By Mr. Black:

Q. What time of day did you see him and charge him with reckless driving?

A. In the afternoon, between three and four.

Q. What he actually did was to attempt to turn around in the street.

A. Yes, sir, after turning around in the street he nearly hit or run into a couple of cars.

Q. He almost hit a car turning around?

A. I thought he was hit.

Q. The real reason was turning around in the street?

A. No, sir, in going up the highway he was driving one side to the other of the highway.

Q. That is on the regular highway that leads out of the town of Dubois?

A. Highway 81, yes sir.



(Testimony of Sid Close.)

Q. When did you say that was? [241]

A. I cannot say just what time it was, but between three and four o'clock.

Q. What year was it ?

A. 1939, the 18th day of July.

Mr. Black: Now, we move to strike all the evidence of this witness on the ground that it is covered by a motion heretofore made as to a separate incident, it is incompetent, irrelevant and immaterial in this case and highly prejudicial, being an entirely separate matter and occurred more than three years before this occurrence involved here.

The Court: Motion denied. Do you have any question Mr. Merrill?

Mr. Merrill: Our understanding is that the motion is sustained as to our clients.

The Court: That is right unless the matter is connected up.

Mr. Davis: Unless Mr. Donnelly has sufficient notice to convey notice.

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MARK MANLEY,

being called as a witness on the part of the plaintiff after being first duly sworn, testifies as follows:

Direct Examination

By Mr. Davis:

Q. Will you state your name?

A. Mark Manley. [242]

(Testimony of Mark Manley.)

Q. What official position, if any, do you hold in Bannock County?

A. Assessor of Bannock County.

Q. Do you have a record of the applications for motor licenses for the years 1939 to 1942?

A. I have.

Q. Do you have applications made by Rulon D. Hair in the name of L. R. Donnelly?

Mr. Merrill: Objected to as leading and immaterial. The pleadings admit the ownership of the car and the name in which the car was registered. This is wholly immaterial for any purpose and may be prejudicial.

The Court: Is the evidence admitted?

Mr. Davis: The applications show that they are signed by Mr. Hair, L. R. Donnelly by Mr. Hair. It is much clearer if we have the copies. Unless counsel admits that Hair was authorized to and did sign L. R. Donnelly by Rulon D. Hair or R. D. Hair, and that the license was issued to Donnelly on Hair's signature.

Mr. Merrill: That is incompetent. It is admitted that this automobile was owned by the Reynolds Tobacco Company and that it was registered in the name of L. R. Donnelly.

The Court: I don't understand [243] whether you admit the statement of Mr. Davis, that is, that your client's name was signed by Mr. Hair.

Mr. Merrill: It is not in issue here. Apparently they have another course in mind than in paragraph six of the complaint and paragraph seven of the answer.

(Testimony of Mark Manley.)

The Court: I will overrule the objection and see what the materiality is.

Mr. Davis: By way of explanation, I asked this witness to bring his originals and I asked him to make copies of the same. He wants to withdraw the originals and I will handle it in that way. If they can be introduced and passed to the jury, then we can stipulate that copies may be substituted for the originals.

The Court: It will be satisfactory to identify the copies.

Mr. Merrill: We have an objection if he wants to introduce them.

The Court: It is understood that if the Court admits them that you may substitute copies.

Q. Mr Manley, calling your attention to the application he made for the year 1939——

Mr. Merrill: ——We object to that as being entirely immaterial for any purpose. The car involved in this action was a 1941 Chevrolet. There [244] is no allegation in the complaint to sustain such a question.

The Court: Overruled.

A. Yes, I have it.

Q. In whose name does it show it was issued?

A. The 1939 license applied for by R. D. Hair and licensed in the name of L. R. Donnelly, 532 Judge Building, Salt Lake City, Utah.

Q. Is the original signed by Hair himself?

A. Yes sir.

(Testimony of Mark Manley.)

Mr. Merrill: Objected to as immaterial and a conclusion of the witness.

The Court: Objection sustained.

Q. Now, turn to 1940, have you the original application for that year?

A. The 1940 application was——

Mr. Merrill: That may be answered yes or no.

A. I have it.

Q. Who does that show the license issued to?

Mr. Merrill: Objected to, the exhibit itself is the best evidence.

The Court: Objection sustained.

Q. Do you have the application for 1941?

A. I do.

Q. And do you have the one for 1942? [245]

A. 1942, yes sir.

Q. Now, Mr. Manley, those are a part of your original files? A. They are.

Q. You have no objection to having them marked as an exhibit. A. No, I haven't.

Q. Calling your attention to exhibit 15, is that a part of your original files?

A. Yes, you asked if they were the originals.

Q. Are they a part of your original records?

A. Yes sir.

Q. Look at exhibit marked number 16, is that also a part of your original records?

A. Yes sir.

Q. Number 17 which has been marked is that also a part of your original official records?

A. Yes sir.

(Testimony of Mark Manley.)

Q. And number 18, how about that.

A. Correct, yes, it is.

Mr. Davis: That is all from this witness.

Mr. Merrill: No questions.

Mr. Black: Nothing.

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### RULON D. HAIR

Being called by the plaintiff for cross examination under the rules, having been first duly sworn, testifies as follows: [246]

#### Cross Examination

By Mr. Davis.

Q. You are Rulon D. Hair, one of the defendants here? A. Yes sir.

Q. Handing you exhibit 15 marked for identification, whose signature is that?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial for any purpose.

Mr. Black: We join in that objection.

The Court: He may answer.

A. Mine.

Q. Handing you exhibit 16, whose signature is that?

Mr. Merrill: The same objection.

The Court: Same ruling.

A. Mine.

Q. Now, you have been handed also exhibit 17, whose signature is that?



(Testimony of Rulon D. Hair.)

Mr. Merrill: The same objection.

The Court: The same ruling.

A. Mine.

Q. And now, exhibit 18?

Mr. Merrill: The same objection.

The Court: The same ruling.

A. That is mine.

Mr. Davis: We offer exhibit 15 in evidence. I ask that it be handed to counsel and I also ask to be permitted to substitute a copy. [247]

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, and not tending to prove or disprove any issue in this case.

The Court: The exhibits may be admitted.

Mr. Davis: Did you want to object to each one.

The Court: I thought you had offered all of them.

Mr. Davis: I will now offer exhibits 16, 17 and 18.

Mr. Merrill: We object to each as being incompetent, irrelevant and immaterial. The ownership of the 1941 truck is admitted and no other truck is involved in this action. They are wholly immaterial for any purpose.

The Court: Objection overruled. They may be admitted.

Mr. Davis: That is all of this witness.

Mr. Black: No questions.

Mr. Merrill: No questions.

## FREDRICK H. SMULLEN

being called as a witness on the part of the plaintiff after being first duly sworn, testifies as follows:

## Direct Examination

By Mr. Davis. [248]

Q. State your name?

A. Fredrick H. Smullen.

Q. Where do you live?

A. In the City of Pocatello.

Q. How long have you lived in the City of Pocatello?

A. Twenty-six years.

Q. You are on the Pocatello Police force.

A. Yes sir.

Q. How long have you been a policeman?

A. Over twenty years.

Q. Do you know Mr. Rulon D. Hair?

A. Not personally acquainted, but I have seen him before.

Q. You know him by sight. A. Yes sir.

Q. Did you have occasion to see him about the 15th of April 1939?

A. Yes sir.

Q. In the City of Pocatello? A. Yes sir.

Q. What time was it?

A. In the morning hours, I don't remember exactly the time.

Q. Was Mr. Hair in, or did he become involved in an accident?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial in this action and not within the pleadings.

Mr. Black: We join in that objection. [249]

(Testimony of Fredrick H. Smullen.)

I also object that it is not within the pleadings being a distinct incident and not connected with the incident here, or any incident for which proof of facts are admissible here. It is prejudicial because the whole facts cannot be presented in this case.

The Court: Overruled.

A. Yes sir.

Q. At that time.

Mr. Black: The same objection.

Mr. Merrill: We make the same objection.

The Court: Overruled.

A. Yes sir.

Q. Did you see the accident?           A. Yes sir.

Mr. Merrill: The same objection and that it is immaterial for any purpose and not within the issues in this case.

The Court: The same ruling with the same understanding.

Q. Was Mr. Hair operating or driving the motor vehicle at that time?

A. He got out of the motor vehicle.

Q. What kind of a motor vehicle did he get out of?

A. A truck—a panel truck or panel body, owned by the Tobacco Company.

Q. Did anyone else get out of the truck at that time? [250]           A. Yes sir.

Q. Who was that?

A. He gave his name as Eckersly.

Q. Was his name Leo?

(Testimony of Fredrick H. Smullen.)

A. I think that was the name.

Q. You saw them get out of the truck?

A. Yes sir.

Q. Did you see someone killed at that accident?

A. Yes sir.

Q. Who.           A. Mr. Myers.

Q. Did you observe the rate of speed at which Mr. Hair was traveling at that time?

Mr. Black: We make the same objection and object on the further ground that it calls for a conclusion of the witness without having laid any foundation. Speed is not involved in this matter at all. It is not a question involved here.

The Court: He may answer yes or no.

A. Yes sir.

Q. Did you make an investigation of that accident immediately?           A. Yes sir.

Q. How far were you from the accident?

A. About eighty feet.

Q. Where was it? [251]

A. The accident happened in the three hundred block on east Center Street.

Q. That is the main street that runs under the subway.           A. Yes sir.

Q. As a police officer have you had occasion to observe the speed and to estimate the speed of cars?

A. Yes, I have had occasion to estimate the speed.

Q. That is a part of your official duty.

Mr. Merrill: Objected to as leading.

Q. Is that a part of your official duty?

(Testimony of Fredrick H. Smullen.)

A. Not as a patrolman.

Q. But as a patrolman you had done that. Have you appeared as a witness in cases where speed was involved?

Mr. Merrill: That is objected to as leading, and it is a double question.

Mr. Davis: Withdraw it.

Q. Have you investigated speeds of cars to determine the speed at which they are traveling?

A. Yes sir.

Q. At what speed was the car traveling at the time of the accident?

Mr. Merrill: Objected to in addition to the objection heretofore made to all this line of questioning, it calls for a conclusion of the witness and there is no showing that he has the [252] ability to determine that, or that he was in a position to determine it. It is immaterial for any purpose.

Mr. Black: Of course, we make that our objection.

The Court: Overruled.

A. I estimate at thirty-five miles an hour.

Q. Did you observe Mr. Hair after he was taken up, what was his condition?

Mr. Merrill: We object to that as immaterial for any purpose.

The Court: Overruled.

Mr. Black: We want to renew our objection, specifically to this question.

The Court: Overruled.



(Testimony of Fredrick H. Smullen.)

A. He seemed to be under the influence of liquor.

Q. Did you testify in the case involving this accident?

Mr. Merrill: Objected in addition to the other grounds that it is wholly immaterial and it is an attempt by counsel to do the very thing which Your Honor has directed counsel not to do.

The Court: I don't think that, but the objection is sustained.

Q. Did you ever see L. R. Donnelly, the gentleman sitting here (indicating)

A. No, I don't think so, I don't know that I did.

Q. Did he ever make any inquiry of you concerning that [253] accident?

A. I don't know that he did.

Q. You have been on duty as a policeman since April 1939.

A. Yes sir, excepting two months.

Mr. Davis: That is all.

### Cross Examination

By Mr. Black:

Q. Mr. Smullen, this accident that you speak of happened on the streets of Pocatello and involved Mr. Myers.

A. Yes sir.

Q. Where was Mr. Myers when he got struck?

A. In the three hundred block on the north side of the street.

Q. With reference to being in the street or on the sidewalk.

A. About ten feet from the curb.

(Testimony of Fredrick H. Smullen.)

Q. What was he carrying, if anything?

A. A broom.

Q. A large street broom. A. Yes sir.

Q. What was the condition as to being wet or muddy?

A. The broom was muddy.

Q. Where were you when you first saw Mr. Hair's car?

A. In front of the Super Cream Ice cream parlor.

Q. That is about the middle of the block.

A. About a quarter of a block down.

Q. Where was Mr. Hair's car when you first saw it? [254]

A. Passed me in front of the ice cream parlor.

Q. Isn't it a fact that you know it was parked across the street in front of the Phoenix Cigar Store and was standing there before it passed you?

A. I didn't notice it.

Q. Do you know that was in the evidence.

A. It might have been in the evidence.

Q. In going from the Phoenix Cigar store to where it crossed the intersection of the two streets would be how far?

A. About two hundred and twenty-five feet.

Q. And then there was an intersection. How wide was the intersection? A. Sixty feet.

Q. As this car was going east along there, just prior to this accident do you know that Mr. Myers was on the sidewalk in front of the Pocatello House, on that corner?

(Testimony of Fredrick H. Smullen.)

A. I didn't see him there.

Q. You know that Mr. Myers was on the sidewalk by the lamp post and started across the street to go to his car, and about in front of his car——

A. ——No sir, I don't.

Q. Then you don't know how the accident happened.

A. I don't know just had it happened, no.

Q. You said that you saw this man Mr. Eckersly get out of this car. [255]

A. Yes sir.

Q. Where did they get out?

A. In front of the R. K. D. Bar.

Q. Were you there?

A. I was by Mr. Myers.

Q. That is how far from the R. K. D. Bar?

A. About a hundred feet on the opposite side of the street.

Q. Isn't it a fact that this accident occurred and then the car was driven up by the Drug store before either of them got out?

A. In front of the R. K. D. Bar.

Q. Where is that with reference to the Drug store?

A. A quarter of a block east.

Q. Were any lights on at that time in the morning.

A. Yes sir.

Q. At that intersection.

A. Yes sir.

Q. Don't you know that there was no light burning there.

A. Yes, there was a light.

Q. You saw it.

A. Yes sir.

Q. Did you hear the testimony of the other

(Testimony of Fredrick H. Smullen.)

police officers that the light was not burning, that it was turned off that morning?

A. I am talking about the street light.

Q. The street light there at the intersection.

[256]

A. The traffic light wasn't burning.

Q. You mean to say that this car was going at thirty-five miles an hour when it passed you at the Soda Fountain store there.

A. That was my estimate.

Q. From that place to the Phoenix Cigar Store was how far?

A. About two hundred and twenty-five feet.

Q. How long is a block there?

A. Three hundred feet.

Q. You were down about a quarter of the way.

A. About three-quarters from first street.

Q. There was nothing about the car that passed you except that it passed you going on East Center?

A. That's all, just passed me.

Q. Isn't it a fact that you testified in that other case that you were looking west and didn't see anything that happened until you heard the crash?

A. Yes sir.

Q. So you don't know what happened in connection with the accident.

A. The only thing I saw was the car running over Mr. Myers.

Mr. Black: That is all.

(Testimony of Fredrick H. Smullen.)

Redirect Examination

By Mr. Davis.

Q. There is a difference between the traffic light and the street light. [257] A. Yes sir.

Q. The street lights were on? A. Yes sir.

Q. Which side of the street was Mr. Hair on?

A. The north side.

Q. That would be the left side.

A. His left.

Q. Was Mr. Myers on his right side?

A. On the North side when I saw him.

Mr. Davis: That is all.

Recross Examination

By Mr. Black.

Q. You didn't see him cross from the Pocatello House, across to the place he was struck by this car.

A. No sir.

Q. You don't know how he got over there?

A. No sir.

Mr. Black: That is all.

Mr. Davis: That is all.

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BEN BUSKIRT

being called as a witness on the part of the plaintiff after being first duly sworn testifies as follows:

Direct Examination

By Mr. Davis.

Q. State your name?

A. Ben Buskirt. [258]



(Testimony of Ben Buskirt.)

Q. Where do you live?

A. Pocatello, Idaho.

Q. What is your business?

A. Police officer, for the City of Pocatello.

Q. Do you know Mr. Hair, R. D. Hair?

A. Yes sir.

Q. Do you remember the occasion of Mr. Myers being killed in an accident?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, prejudicial and not supported by any pleadings, or by any allegation of the pleadings.

Mr. Davis: Withdraw the question.

Q. Do you remember seeing Mr. Hair early in the morning of April 15, 1939?

Mr. Merrill: Objected to as incompetent, and immaterial and not tending to prove or disprove any issue in this case.

Mr. Black: I wish to renew our objection.

The Court: Overruled.

A. Yes sir.

Q. Did you see him driving a truck?

A. Yes sir.

Q. What kind of a truck was it? [259]

Mr. Merrill: May our objection go to this entire line of testimony?

Mr. Black: And our objections also.

The Court: Yes, and the same ruling is made.

Q. What kind of a truck was it?

A. A panel truck, half ton panel truck, I don't remember the make.

(Testimony of Ben Buskirt.)

Q. Do you remember the advertisement on it, if there was any on it?

A. Yes sir, R. J. Reynolds Tobacco Company, camels and prince albert.

Q. How many times did you see him that morning? A. Twice that I remember.

Q. Where was the first place you saw him in that truck? A. The El Rio.

Q. Where is that?

A. It is a night club on the American Falls Highway.

Q. Was there any passenger, or any other person in the truck with him at that time?

A. I didn't see him in the truck. I saw the truck there and I saw him inside, but I didn't see him in the truck at that time.

Q. Later did you drive behind that truck?

A. Yes sir.

Q. Where did you drive behind that truck?

[260]

A. We drove down north main street going into town.

Q. Who was driving the truck at that time?

A. I couldn't say.

Q. Mr. Merrill: Now we object to any further testimony along this line by this witness.

The Court: Overruled.

Q. Had you finished your answer. A. No.

Q. Go ahead and finish.

A. I couldn't say specifically, there was two people in truck of which he was one.

(Testimony of Ben Buskirt.)

Q. Who was the other person, a man or woman?

A. A man.

Q. Did you follow the truck any place?

A. It seems to me that there was some time elapsed there before I saw him again.

Q. Where did you next see him?

A. I was coming out of the east end of the Center Street Underpass and I came upon his truck again, he was in front of me between first and second.

Q. Did he keep traveling? A. Yes sir.

Q. Did he strike any object.

A. Yes sir, between Second and Third.

Q. Was that object a person?

Mr. Black: We object to that as [261] leading, in addition to our other objections.

The Court: Overruled.

A. I didn't see the truck strike anyone, I was back a good hundred yards from the truck at first. I didn't notice until after that part of the incident.

Q. How many people got out of the truck?

A. There was two. That was the first I noticed the truck again.

Q. Were they both men? A. Yes sir.

Q. Do you know the name of the other person that was in the truck besides Mr. Hair.

A. Yes sir.

Q. Who was that? A. Mr. Eckersly.

Mr. Davis: That is all.

(Testimony of Ben Buskirt.)

Cross Examination

By Mr. Black.

Q. You didn't see that accident when it happened?

A. I didn't see the accident part of it.

Q. You were at least a hundred yards away?

A. Yes sir.

Q. After the accident you came up to where it happened? A. Yes sir.

Q. In that block there, what building is on the corner of the block, the Southwest corner? [262]

A. The Pocatello house.

Q. A hotel? A. Yes sir.

Q. At the corner? A. Yes sir.

Q. From there to where it happened,—where this accident happened, what was the condition of cars being parked in front of the hotel?

A. It seems to me there was cars parked in front along there. I was driving quite a large car and I drove even with the truck before I could park. I wouldn't say how many.

Q. But there were cars parked there?

A. Yes, I would say that there was.

Q. If anybody came from the corner of the hotel out into the street they would have to pass along by one of those cars before they would be visible?

A. I don't know about that. I don't know the position of the cars or how far down the street they were parked.

Q. Did you see Mr. Myer's car on the opposite side of the street, that he was going to?

(Testimony of Ben Buskirt.)

A. I didn't know Mr. Myers and didn't know that he owned a car.

Mr. Black: That is all.

Mr. Davis: That is all.

The Court: We will recess until [263] 10 o'clock tomorrow morning.

(Admonition to the jury.)

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10 o'clock A.M. October 22, 1943

The Court: In connection with the testimony of Sheriff Close, on the motion of Mr. Black on behalf of the defendant Hair, to strike that testimony, the Court will reverse its ruling on that and strike the testimony of the Sheriff as to the Defendant Hair.

Mr. Merrill: It was not admitted as to the other defendants.

The Court: It was admitted with the understanding that it *would connected up*.

Mr. Merrill: I will want to be heard on that.

The Court: Yes, I will hear you.



## RUSSELL TUESHER

being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

## Direct Examination

By Mr. Davis:

Q. State your name. A. Russell Tuesher.

Q. Have you ever been a witness before?

A. No sir, I never have.

Q. Where do you live, Russell?

A. Montpelier, Idaho. [264]

Q. How long have you lived there?

A. All my life.

Q. What is your age? A. Thirty-one.

Q. What is your business?

A. Brakeman on the railroad.

Q. Avenell Newby was your sister?

A. Yes sir, she was.

Q. I call your attention to the gentleman, the third from the end (indicating) have you ever seen him before? A. Yes sir.

Q. And Mr. Hair here (indicating) have you ever seen him before? A. Yes sir.

Q. When did you see these two gentlemen?

A. Shortly after the accident that caused the death of my sister.

Q. Where did you see them?

A. In Montpelier.

Q. Who was with you?

A. My brother Cal.

Q. Where was that?

A. In front of the Burgoyne Service Station.

(Testimony of Russell Tuesher.)

Q. Did you have a conversation with Hair?

A. Yes sir.

Q. What was that conversation? [265]

A. I asked Mr. Hair where he was going and he said he was going home, and I said are you going home, I said, the young lady you were with last night was my sister and I don't think you are going, we don't like that.

Q. Was Mr. Donnelly there at that time?

A. Yes sir.

Q. Did he say anything?                      A. Yes sir.

Q. What did Mr. Donnelly say at that time?

A. He said, "good God, did you have a woman with you again, I didn't know that."

Q. What did Mr. Hair say?

A. He said "I did but I didn't tell you because I thought she was getting along all right."

Q. Did Mr. Donnelly say anything, or did you have a conversation with Mr. Donnelly about the Doctor or physician?

A. Yes sir.

Q. What was said?

A. Mr. Donnelly said "what is being done for her" and I said "we have as good a doctor as there is in town" and he questioned their efficiency, and I said "the best way to find out is to go to the hospital."

Q. Did you go to the hospital?                      A. Yes sir.

Q. Who went? [266]

A. My brother Cal, Donnelly and I.

Q. How did you go?

A. In an automobile.

(Testimony of Russell Tuesher.)

Q. Did Mr. Donnelly state anything further to you?

A. Yes, that he had trouble with this young man before; that he was through with him, and in the course of the conversation Mr. Donnelly offered me a job.

Q. What did you tell him?

A. I told him I had a good job on the Union Pacific.

Q. Did Mr. Donnelly go any place?

A. Yes sir.

Q. Where did he go?

A. The hospital to talk to the Doctor.

Q. Was your brother there when you had this conversation about having trouble with Mr. Hair before?

A. Yes sir.

Q. And did you go to the hospital?

A. Yes sir.

Q. Was there any conversation with reference to George Newby?

A. Yes sir.

Q. What did Mr. Donnelly say about that?

A. He said that I looked like a sensible young man and that I should mention to him that he needn't get the idea to sue this big company that it was too big a company to buck.

Q. And was there anything said about lawyers?

[267]

A. Yes, he said that some lawyer would come along and make George think he had a good case and that he would end up by spending a good sum of money.

(Testimony of Russell Tuesher.)

Q. Did he say anything more about Mr. Hair?

A. Yes, in the closing remarks of the conversation my understanding was that he said Mr. Hair was through with the Company that he couldn't use him any more.

Q. Did he tell you why?

A. Because he couldn't trust him, principally.  
Mr. Davis: That is all.

Cross Examination

By Mr. Merrill:

Q. You had three conversations with Mr. Donnelly, one at the hospital, one after he came out of the hospital,—strike that,—one at the service station, one after he came out of the hospital and one at the police station?

A. The one at the police station and one walking home which I regard as the same conversation.

Q. In which conversation did you discuss the children?

A. I don't remember discussing them.

Q. Did you not tell him that the children had been with you during the night of Thursday night and on Friday?

Mr. Davis: Objected to as not proper cross examination.

The Court: He may answer.

A. The exact date I don't know. [268]

Q. Didn't you tell him you had the children with you?

A. One night but I don't know what date.

(Testimony of Russell Tuesher.)

Q. Didn't you tell him you went and got the children because their mother wasn't home?

A. The date I didn't know.

Q. Did you tell him you got the children?

A. Yes, that I got the children.

Q. And that they were with you?

A. Yes, I did.

Q. You live at Montpelier? A. Yes sir.

Q. You knew as a matter of fact,—did you not go over to the house where Avenell Newby and her husband and children had been living during the later evening just before this accident and take them to your house?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial and it is not proper cross examination as to any conversation that he had which he testified to on direct examination.

The Court: Sustained as not proper cross examination.

Q. Did you not tell Mr. Donnelly in that conversation that you say was one of the conversations at the Police station or coming from it, in substance and effect that your sister had always been a problem child? [269] A. I did not.

Q. Did you not tell Mr. Donnelly in that conversation that she had told you that she was going out on Thursday evening? A. No.

Q. Just a minute, and did you not tell Mr. Donnelly in that conversation that you learned that your sister was going out with a tobacco salesman



(Testimony of Russell Tuesher.)

and that you begged her not to go, that was Thursday night preceding the accident on Friday about four P.M. and that you had pleaded with her not to go out with him and she said she was going anyway; that she had met a good looking tobacco salesman and was going out and have a good time? Did you not tell Mr. Donnelly that in that conversation?

A. I was not even there that night.

Q. Did you not tell Mr. Donnelly that in that conversation?      A. No sir, I didn't.

Q. Did you tell him that you tried to persuade her not to go out?

A. I did not. I was not home that night.

Q. Did you not also tell him that late that evening you became worried about the children and went and got them and put them to bed in your home? Did you not tell Mr. Donnelly that?

A. No sir, I did not.

Q. You did go and get the children and put them to bed? [270]

Mr. Davis: Objected to as not proper cross examination.

The Court: Sustained.

Mr. Merrill: That is all.

## CALVIN TUESHER

being called as a witness on the part of the plaintiff, after being first duly sworn, testifies as follows:

## Direct Examination

By Mr. Davis:

Q. State your name. A. Calvin Tuesher.

Q. Have you ever been a witness before?

A. No sir.

Q. How old are you Calvin? A. Twenty.

Q. Where do you live? A. Geneva, Idaho.

Q. You are a brother of Avenell Newby, deceased? A. Yes sir.

Q. Calling your attention to the gentleman here, the third from the end (indicating) have you ever seen him before? A. Yes sir.

Q. And the other gentleman next to him, this way? A. Yes sir.

Q. Where did you meet them?

A. At Montpelier. [271]

Q. Where were you in Montpelier when you met them?

A. With my brother Russell in front of the Burgoyne service station.

Q. Did you hear any conversation at that time?

A. Yes sir.

Q. Did Russell say anything to Mr. Hair when they met there? A. Yes sir he did.

Q. What did he say?

Mr. Merrill: Objected to as no foundation is laid, when it was or the place.

(Testimony of Calvin Tuesher.)

Q. You heard your brother Russell testify?

A. Yes sir.

Q. How long was it after the accident in which Avenell was hurt was it that you had this conversation, or was the conversation had?

A. Shortly after.

Q. In what town?                      A. Montpelier.

Q. At what place?

A. Roy Burgoyne service station.

Q. Who was there?

A. Mr. Hair, my brother and myself, in which this gentleman said that he was going to leave town.

Q. Did Mr. Donnelly come up when you were talking, or when they were talking?

A. That's right. [272]

Q. What did your brother say?

A. He asked him where he was going and he said that he was going home, and my brother said in case you are interested that is my sister that is in the hospital dying now, and you are not going.

Q. Did Mr. Donnelly say anything?

A. Yes sir.

Q. What did he say?

A. He said "for God's sakes were you with another woman."

Q. Was anything said there with reference to the Doctor?                      A. That's right.

Q. By Mr. Donnelly?                      A. Yes sir.

Q. What did he say?

(Testimony of Calvin Tuesher.)

A. He questioned the efficiency of the Doctor because it was such a small place.

Q. Did you go any place then?

A. Yes, to the hospital.

Q. How did you go?

A. I drove George Newby's car.

Q. Who went with you?

A. My brother and Mr. Donnelly.

Q. Did you hear your brother and Mr. Donnelly have any further conversation? A. They did.

Q. What did Mr. Donnelly say? [273]

Mr. Merrill: Objected to and no time or place is fixed.

Mr. Davis: I will fix the time and the place, Mr. Merrill.

Q. In the automobile when you were driving to the hospital did they have a conversation?

A. Yes sir.

Q. Mr. Donnelly was in the car was he?

A. Yes sir.

Q. You were in the car?

Mr. Merrill: Objected to as leading.

The Court: He may answer.

A. Yes sir.

Q. Now, what did he say?

A. He said that Russell was very level headed, the coolest one in the bunch and he offered him a position. He said he couldn't trust Hair any more.

Q. Was there anything said about warning him before?

(Testimony of Calvin Tuesher.)

A. Yes sir, he said he couldn't trust him any more.

Mr. Davis: That is all, you may examine.

### Cross Examination

By Mr. Merrill:

Q. Isn't it a fact that what Mr. Donnelly said to your brother about a position was that he asked if he had a position, or was working? Isn't that what he said? [274]

A. He offered him a position.

A. Isn't it a fact that he asked your brother if he had a position or was working?

A. Well, I don't remember the exact words.

Q. Would you say that was not what was said?

A. No.

Q. Don't you recall that what was said about a position, Mr. Donnelly asked your brother if he had a position or was working?

A. I don't remember just the words.

Mr. Merrill: I think that is all.

Mr. Black: I have no questions.

Mr. Davis: Is it agreeable that the Mother of Mrs. Tuesher may be excused, she wants to go home with the two children, and these two babies *is agreeable* that they may be excused?

Mr. Black: It is agreeable with me.

Mr. Merrill: Yes, that is agreeable.

The Court: They may be excused.

Mr. Davis: I have volume 41 of Corpus Juris and I ask permission to read from the American



experience table of insured mortality as it appears in Corpus Juris for the purpose of giving the life expectancy of one 28 years of age. [275]

Mr. Merrill: Objected to as not proper at this time, no foundation is laid, and it is incompetent as offered.

The Court: You may put it in the record.

Mr. Davis: The table shows, at page 216 of volume 41 Corpus Juris that the life expectancy of one 28 years of age to be 36.73 years.

Now, if the deposition of Mr. Darr may be read at this time. I will ask the Bailiff to hand it to me and I will ask Mr. Coughlin to take the stand for the purpose of assisting with the deposition. We want to offer the cross examination.

Mr. Merrill: We object to the introduction of any cross examination before the witness has testified on direct, it is utterly immaterial and it is not the proper way to proceed.

The Court: I think you may proceed.

Mr. Merrill: We further object to offering any of the deposition unless they offer the whole deposition. The cross examination is not understandable and cannot be properly construed unless the testimony in chief, to which the cross examination is had, is first in. If he offers any of it he should offer the entire deposition, and we object to proceeding in any other way. If he is to proceed with the cross- [276] examination over our objection then we certainly urge that he be required to put in the entire deposition.

The Court: What do you desire to do in view of the objection made?

Mr. Davis: We can offer any part of the deposition at any time, under the rule. If he wants to offer the entire deposition that is all right with me, but to refuse me the right to use it would not be proper. I am not offering it to prevent the rest of it from going *it*. If any of it is not understandable I am willing that any of the other proof go *go* in that may be in the deposition.

Mr. Merrill: We challenge his interpretation of the rule. The deposition was taken under stipulation and they are attempting to offer in evidence only parts of the deposition, leaving out portions and that would be confusing. If they put in any part of the deposition it is incumbent upon them to put it all in.

The Court: I think not. I think where the cross examination is not understandable then the direct examination may be put in by counsel. You may proceed.

Mr. Merrill: We will have our exception of course?

The Court: Yes, of course. [277]

Mr. Davis: I will read the questions and this is cross examination.

## DEPOSITION OF E. A. DARR

Q. Mr. Darr, I believe you stated that Mr. Rulon D. Hair was employed by the Company some time in 1937.

Mr. Merrill: I object to that, there is no showing that he so testified.

The Court: You may answer.

A. July 20, 1937.

Q. Has Mr. Hair been in the continuous employment of the R. J. Reynolds Tobacco Company since that date, up until the time of this accident about which this suit is involved?

Mr. Merrill: May our objection go to this entire line of testimony upon the grounds that we have heretofore made?

The Court: Yes, and an exception is granted.

A. He had.

Q. This panel truck you spoke of, involved in the accident in the case at bar, was delivered to him some time in 1942?

A. On February 8, 1942.

Q. Was that a new Chevrolet panel truck at that time?

A. I am not certain, but I am inclined to think it was, since that agreement would have to be signed by a [278] salesman each time a new car or a car is delivered to him.

Q. Or a change of the car?

A. Or a change of car. He had previously signed a similar agreement in February 1928, which was the first time he had been given a car.

(Deposition of E. A. Darr.)

Q. What kind of a car was that you delivered to him at that time,—a Chevrolet?

A. I am unable to say. My records don't show.

Q. Well, the car you delivered to him in 1938, the first car, was that the only car that was delivered by the R. J. Reynolds Tobacco Company to Mr. Hair up until this car of February 1942?

A. That is correct.

Q. In other words, he has had in his possession two cars of the R. J. Reynolds Tobacco Company during his employment.

A. That is right. I think I must qualify that answer. Without examining our records, I would be unable to say whether there were just two cars or whether there had been a series of cars that had been delivered to him between February 1938, and February 1942.

Q. The first car that the R. J. Reynolds Tobacco Company delivered to Mr. Hair was the car in which he was involved in the accident in which Myers was killed in April 1939, is that right? [279]

Mr. Merrill: That is objected to in addition to the other grounds, that it is incompetent, irrelevant and immaterial; there is no pleading in this case to warrant the question.

Mr. Black: We want to interpose an objection so far as Hair is concerned. It is an isolated accident without all the facts being brought before the Court, nothing but the questions that are being asked. If it is permitted to go in we ask the Court to instruct

(Deposition of E. A. Darr.)

the jury that they cannot consider it so far as the defendant Hair is concerned.

The Court: He may answer the question but the answer will not apply in any way or be considered by the jury in any way as against the defendant Hair.

A. I would have to check the records to see if it was the identical car.

Q. But it was a car of the R. J. Reynolds Tobacco Company?      A. It was.

Q. Whatever car he might have been using at that time?      A. That is right.

Q. And the car that you delivered to him in February 1942, of the R. J. Reynolds Tobacco Company is the car that is involved in the injury of the plaintiffs' intestate in this particular accident?

A. That was my understanding.

Q. Have you ever seen Rulon D. Hair yourself? .  
[280]

A. No, not to my recollection.

Q. Under whom does he work in that territory?

A. His division manager is L. R. Donnelly.

Q. Has Mr. L. R. Donnelly been Division Manager in that territory all the while since Rulon D. Hair became employed by the R. J. Reynolds Tobacco Company?      A. He has.

Q. Does Mr. Hair make his reports to the Division Manager, Mr. Donnelly, or does he make them direct to the Company?      A. Both.

Q. He delivers you a copy, or Mr. Donnelly a copy of the reports that he sends in from his work and business, is that right?



(Deposition of E. A. Darr.)

Mr. Merrill: That is objected to as not proper cross examination. It is incompetent, irrelevant and immaterial and no proper foundation is laid for it at all.

The Court: It may be admitted.

A. That is right.

Q. So Mr. Hair,—Mr. Rulon D. Hair then works and operates under Mr. L. R. Donnelly as Division Manager of that particular territory?

A. That is right, plus his direct connection with this office.

Q. But Mr. Donnelly, the Division Manager, is his direct [281] superior officer in the operation of the business for the R. J. Reynolds Tobacco Company, is that right? A. That is right.

Q. You did know, Mr. Darr, that Rulon D. Hair was involved in an accident with the R. J. Reynolds Tobacco Company truck on or about April 11, 1939, in which a man Myers was killed?

Mr. Merrill: To which we object that it is incompetent, immaterial and no sufficient foundation is laid, and the evidence of one act would not constitute incompetency under the rule that has been called to Your Honor's attention. This is in addition to our objection to all the evidence.

Mr. Black: And we object so far as defendant Hair is concerned.

The Court: The objection is sustained as to the defendant Hair, and overruled as to the other defendants.

A. Yes.

(Deposition of E. A. Darr.)

Q. Mr. Donnelly was the Division Manager at that time?      A. That is right.

Q. I believe a suit was brought against the R. J. Reynolds Tobacco Company with the same defendants in that particular case as are the defendants in this case?

*Mr. Merrill: We object to this on the ground that it is immaterial and not related in [282]*

Mr. Merrill: Objected to as being immaterial and not related to any matter covered by the direct examination, it is not proper cross examination and there is no connection with any matters involved in this suit. That is in addition to the objections heretofore made to this line of testimony.

Mr. Black: I want to renew our objection to this.

The Court: The objection is sustained as to Mr. Hair, and as to the defendants Tobacco Company and Donnelly it is overruled.

A. I can't answer that without referring to the file, as to whom the suit was brought against.

Q. Have you a record of the pleadings or the papers that were served on the R. J. Reynolds Tobacco Company in that suit?

Mr. Merrill: The same objection.

Mr. Black: The same objection.

The Court: The same ruling.

A. It appears from the correspondence that Donnelly was joined as a defendant with the Company and Hair.

Q. You do not have a copy of the Court pleadings in that case?

(Deposition of E. A. Darr.)

Mr. Merrill: The same objection as previously made.

Mr. Black: The same objection.

The Court: The same ruling. [283]

A. Well, not all the Court pleadings. We have got here probably a copy of the complaint.

Mr. Merrill: I move to strike the answer as being incompetent, irrelevant and immaterial.

The Court: Denied, the answer may stand.

Q. Was that complaint served on the R. J. Reynolds Tobacco Company?

Mr. Merrill: I object to the question for the reason that it deals with matters foreign to this suit and it is incompetent, irrelevant and immaterial and not proper cross examination. This is in addition to our other objections.

Mr. Black: Defendant Hair makes the same objection that it does not apply here.

The Court: The same ruling.

Mr. Davis: The next is where counsel there offered a copy of the complaint. I am not offering the complaint, I think the fact that they were served is sufficient to prove knowledge. Now, I will turn to the question in the middle of page thirty of the deposition.

Q. Mr. Darr, when did you receive a report as to the accident of April 1939, April 11, 1939?

Mr. Merrill: The same objection.

Mr. Black: The same objection. [284]

The Court: The same ruling.

A. On April 15, 1939.

(Deposition of E. A. Darr.)

Q. From whom did you receive that information?

A. From L. R. Donnelly.

Q. He is the same L. R. Donnelly, your Division Manager?

A. That is right.

Q. Did you have an investigation made as to that accident which resulted in the death of Mr. Myers?

Mr. Merrill: Objected to as incompetent irrelevant and immaterial, as to any of the issues here, and not proper cross examination.

Mr. Black: Defendant Hair renews his objection also.

The Court: The same ruling, it is not permitted as to defendant Hair.

A. We received a complete report from Mr. L. R. Donnelly, and also from Mr. C. C. Roe, Department Manager under whose supervision both Mr. Donnelly and Mr. Hair were working.

Q. Did you receive more than one report from Mr. Donnelly or Mr. Roe as to this accident on April 11, 1939?

Mr. Merrill: The same objection.

Mr. Black: The same objection.

The Court: The same ruling.

A. We received the initial report of the accident, and [285] we received supplemental reports.

Q. How many supplemental reports did you receive?

Mr. Merrill: The same objection.

Mr. Black: The same objection.

The Court: The same ruling.

(Deposition of E. A. Darr.)

A. Well, there were quite a number of letters and telegrams in regard to developments in the case.

Mr. Davis: There appears introduced in evidence at that time exhibits b, c, d, e, f, g and h, and I now offer exhibit B, being a letter from L. R. Donnelly to Charles C. Roe, that was identified by Mr. Donnelly yesterday and I ask now to read it to the jury.

Mr. Merrill: We make the objection in addition to our other objections that it is incompetent, irrelevant and immaterial and that it does not tend to prove or disprove any issue in this case. That the letter is in no wise any proof of any matters here involved.

Mr. Black: May I make this objection that it is incompetent, irrelevant and immaterial so far as the defendant Hair is concerned, any matters passing between the Company and these employees, and may I have this objection without renewing it each time an offer is made? [286]

The Court: Yes, you may, and this objection is sustained as to the defendant Hair, and the same ruling is had as to all the correspondence between the Company and Donnelly, but as to the defendants Donnelly and the Tobacco Company it is admissible.

Mr. Davis: I will read exhibit B. "April 17, 1939, Salt Lake City, Utah. Mr. Charles C. Roe.

Inclosed please find a newspaper clipping that was cut from local paper. You will please note how the papers are playing up this accident. I know that the clipping is all wrong because I investigated



(Deposition of E. A. Darr.)

the accident myself. I will try to give you an account of the accident. Mr. Hair after leaving a cafe not quite a block away started to drive home going east on main street, after going across the following street a man loomed up in front of him from between two cars coming from the right curbing, Mr. Hair immediately applied his brakes that were in good working order and swerved his car to the left at the same time to try to miss the man. The man became confused and dodged back and forth and finally Mr. Hair hit the man a little to the left of the center line. Mr. Hair was on the left because he tried to miss the man that was coming from the right. You are well acquainted with the narrow streets in Pocatello and one doesn't have to go [287] far to be over the center line as there are only room for two cars on these streets opposite each other.

After hitting the man Mr. Hair stopped within 25 feet (car length) and then drove on a little farther to find a parking place along the curbing as there were cars lined up on both sides of the street. The distance he had to go to find this parking place was a little over 200 feet, the paper would make you believe that Mr. Hair could not stop within this distance. The police tried to place a drunken driving charge on Mr. Hair but this would not stick as they examined him and could not find that this was true, so they took this charge off and placed a manslaughter charge against him. The police had the company car parked on the street so that everyone could see it and cause public sentiment against Mr. Hair

(Deposition of E. A. Darr.)

to strengthen their case against him. When I got to Pocatello I tried to have the car released but they only got tough about it and so did I they thought they could pull a bluff. It was late around 10 P.M. Saturday so on Sunday I again went to the police station and pulled a bluff on them I told them I was having papers drawn up not only to have our property placed in a garage to safeguard the tobacco in the truck but also was looking over the matter of the unjust advertising that was being created by our car out on the street. I intimated that there might be a suit brought against the city due to this sentiment that was being [288] caused against the company. Well they couldn't release the car fast enough I placed it in a garage and invoiced the tobacco in it and took the tobacco over to Rino Candy Company for storage. The car is damaged in front quite a little will have to have a new radiator and the engine gone over I am having the Chevrolet dealer give me a bid on this car and then will find out how much it will take to have it repaired and will decide what is the best thing to do with it. I cannot have the car repaired until the first hearing that will take place on wednesday or Thursday. I drove back to Salt Lake late Sunday and will work with Craig Tuesday on my way up to Pocatello, I will stay for the first hearing as no doubt they will call me for a witness and then set the time for the final trial.

My car is about to fall to pieces so will pick up a coupe in Ogden on my way through there. The one

(Deposition of E. A. Darr.)

that we bargained for, the sedan delivery will come later. Yours very truly. L. R. Donnelly.

Mr. Davis: I now offer what is marked as exhibit C, a telegram.

Mr. Merrill: We make the same objection.

Mr. Black: We make the same objection.

The Court: The same ruling, admitted.

Mr. Davis: I will read this into the record: "Western Union. Received at,—CFA3 11—[289] Salt Lake City, Utah 15 730 A.

R. J. Reynolds Tobacco Company, Winston Salem N. Car.

R. D. Hair's car struck and killed man Pocatello, particulars later. L. R. Donnelly.

Mr. Davis: I now offer exhibit marked D in the deposition, being a letter from Charles C. Roe to the Reynolds Tobacco Company.

Mr. Merrill: The same objection that we made to the first exhibit offered.

Mr. Black: We make the same objection.

The Court: The same ruling.

Mr. Davis: I offer exhibit D marked for identification and a part of the deposition, pardon me, I will now read the exhibit.

"Denver Colorado, April 18, 1939.

R. J. R. I am attaching hereto a letter just received from Mr. Donnelly which is self-explanatory, together with a clipping relative to Mr. Hair's accident in Pocatello.

You will notice Mr. Donnelly states the car is damaged to quite an extent, and it would be my

(Deposition of E. A. Darr.)

suggestion, instead of having it repaired, get offers from Chevrolet dealers in Pocatello and Ogden, and plan on replacing this car with a new Chevrolet sedan deliver.

Regardless of who is placed in the Poc- [290] atello assignment, if a new car is purchased he would not want to be driving a car around the streets that had had a misfortune such as the old one. In other words we would be starting out with a clean slate, and naturally it would also help to hold down comment, etc., Yours very truly, Charles C. Roe."

Mr. Davis: Next I want to offer exhibit E, which is a letter to Mr. E. A. Darr.

Mr. Merrill: Objected to on the same grounds as stated in the objection to the first of this series of exhibits.

Mr. Black: And we make our same objection.

The Court: The same ruling.

Mr. Davis: I will read this exhibit. "R. J. R. No doubt you have received word from Mr. L. R. Donnelly of Salt Lake City relative to the car wreck that Mr. R. D. Hair had early Saturday morning April 15.

Just as soon as Mr. Donnelly received word of this wreck he wired me brief details of what happened I replied by wire for him to proceed to Pocatello and get full information as I planned on calling him long distance to see what actually took place.

Sunday afternoon, April 16, I called Mr. [291] Donnelly in Pocatello and he informed me Mr. Hair had taken his wife to the Station to catch an early



(Deposition of E. A. Darr.)

morning train at 4 A. M. and as he was returning back through town on Main street, which is a very narrow street, a street worker walked out between two cars. Mr. Hair ran into him which caused the street worker's instant death. Mr. Donnelly stated that this street worker was an old man, about seventy years old and could not see or hear very well, however, both the street worker and Mr. Hair probably thought no one else was out or around at that hour of the morning, which caused this accident.

I called the Maryland Casualty Company early Monday morning and gave them what information I had and they wired their San Francisco office the information I gave them.

Mr. Donnelly was not sure just when the hearing was to be held, either Monday or Tuesday of this week, but from the talk that was circulating around Pocatello, he thought Mr. Hair would be charged with manslaughter. I instructed Mr. Donnelly we would make no attempt to replace Mr. Hair until I arrived in Salt Lake City this week end, at which time I expect to have full information. Yours very truly, Charles C. Roe."

Mr. Davis: Next we offer exhibit F, being a wire copied in Mr. Darr's deposition.

Mr. Merrill: To which we object on the [292] same grounds as we objected to the first of this series of exhibits.

Mr. Black: We make our objection.

The Court: The same ruling.



(Deposition of E. A. Darr.)

Mr. Davis: On the last exhibit I read to the jury, the heading was Denver Colorado, April 18, now exhibit F, which is a telegram.

“Postal Telegraph CHA 19 59 NL XU Salt Lake City, Utah, 1939, Apr 23 PM 10 45.

R. J. Reynolds Tobacco Company, Winston Salem, N Car.

Hair is out on bond trial will be next month. Donnelly thinks he will come clear. Would you consider him to continue until out come is known. Donnelly regrets losing Hair due to his sales ability and past results. If possible would recommend we let Hair continue. Can have car repaired for small expense for time being. Wire instructions. Charles C. Roe.”

Mr. Davis: We now offer exhibit G in the deposition, being a Postal Telegram from Mr. Darr to Mr. Roe.

“Confirmation of serial message sent via Postal Telegraph Company. From R. J. Reynolds Tobacco Company, Manufacturers of Cigaretts, Smoking, Plug and Twist Tobaccos, Winston Salem N. C. Dated April 24, 1939. Mr. Charles C. Roe, care of L. R. Donnelly, 532 Judge Building, 8 East Broadway, Salt Lake [293] City, Utah.

Since Hair was using Company car on personal business our disposition is to get his resignation. However, willing approve your recommendation as to continuing him provided he agrees pay full cost repairs to Company car. EAD h f.”

(Deposition of E. A. Darr.)

Mr. Davis: Next is exhibit H which I now offer, and it is a letter from Mr. Roe to Mr. Darr.

Mr. Merrill: Our objection is also made to this exhibit.

Mr. Black: And our objection also.

The Court: There is so very much of this letter that is entirely immaterial and possibly prejudicial that I believe I will sustain the objection to this exhibit.

Mr. Davis: Very well, the next question is on page 39, if the Court is following in a copy.

Q. Mr. Darr, did those reports or your information show that Mr. Rulon D. Hair had with him at the time of the wreck of April 11, 1939, a guest in his car?

A. It showed that he did not have a guest with him at the time of the accident.

Q. Didn't you learn later that a man by the name of Esterly,—that should be Eckersly,—was a guest in the car at that time?

Mr. Merrill: We object on the other [294] grounds heretofore stated and the further ground that it is not proper cross examination.

A. I have never received any such information.

Q. Mr. L. R. Donnelly attended the preliminary trial in which Mr. Hair was indicted for manslaughter, didn't he?

A. I am unable to say.

Q. You don't know whether he was there or not?

A. I do not.

Q. Do you know that it was shown in the evidence of that trial there was a man by the name of Esterly

(Deposition of E. A. Darr.)

or some other guest with him at the time of that accident?      A. I do not.

Q. You don't know that it was shown in the evidence of that trial there was a man by the name of Esterly or some other guest with him at the time of the accident?      A. I do not.

Q. You never had any such information?

A. No.

Q. You knew that Hair was convicted of manslaughter, did you not, in the criminal courts of Idaho, in that particular wreck?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial, prejudicial and not proper cross examination. All of which is in addition to our previous objection and former objections.

Mr. Black: We renew our objection. [295]

The Court: The objection is sustained.

Mr. Davis: I assume that the Court will sustain the objection to the next two questions. I will now turn to page 41 of the deposition.

Q. Do you know that Mr. Rulon D. Hair had a license to operate an automobile?

A. I did not. I assumed that he had.

Q. You had no record of that at all?

A. No.

Q. From the time he first was employed by the Company, up until this last accident?

A. We don't require that proof to be given us that a man has a license. We assume that he has one.

(Deposition of E. A. Darr.)

Q. You would know, though, Mr. Darr, wouldn't you, that in most states if a man had been convicted of reckless driving to the extent of being convicted of manslaughter that his license would be canceled as a matter of law.

Mr. Merrill: Objected to in addition to the previous grounds stated, that it calls for a conclusion of the witness, and a legal conclusion at that.

The Court: Sustained.

Q. You didn't make any inquiry about that did you?

Mr. Merrill: The same objection, that question is too indefinite as it stands now.

The Court: Sustained. [296]

Q. And Mr. Donnelly or no one else of a superior officer ever made a report to you about that one way or the other did they?

Mr. Merrill: The same objection.

The Court: In view of the ruling on the other question, the objection is sustained.

Q. Did you know that Mr. Rulon D. Hair was convicted of reckless driving on July 22, 1939, at and near Boise.

Mr. Davis: That should be Dubois in the state of Idaho, and fined \$50.00 and the cost?

Mr. Black: We want to have our objection to all this matter.

Mr. Merrill: We make the same objection as heretofore made.

The Court: Sustained as to Hair. Overruled as to the other defendants.

(Deposition of E. A. Darr.)

A. That is news to me.

Q. Did you know that the record of that indictment was published in the Idaho Falls Post Register of that date?

Mr. Merrill: The same objection.

The Court: The same ruling.

A. I have no way of knowing that.

Q. Mr. Donnelly or no superior officer never made any notice of that fact, or report of that fact to you, did they?

Mr. Merrill: The same objection to [297] all this testimony.

The Court: He may answer.

A. No sir.

The Court: The objection of Mr. Black's is sustained as to the defendant Hair, that is understood.

Q. I believe you stated in a former interrogatory that you did have on one occasion a statement that Mr. Hair had had his wife as a guest on some trip to a station. I believe that is right, isn't it?

Mr. Merrill: We have our objection to all of this examination.

The Court: Yes, and the same ruling.

A. That was in connection with the April 1939, accident. He had taken his wife and daughter to the station, and the accident occurred on his way home.

Q. When did you get a report of the accident of September 11, 1942, in which Avenell Newby was killed?



(Deposition of E. A. Darr.)

Mr. Merrill: Objected to in addition to the other grounds made, that it is no proper cross-examination and that it is incompetent and immaterial.

The Court: Sustained.

Mr. Davis: If the Court please, the next letter that is offered in the deposition is the exhibit that was identified yesterday by Mr. Donnelly, it is admitted in evidence and it comes in here and I [298] would like to read it to the jury at this time.

The Court: You may proceed.

Mr. Davis: "Office of L. R. Donnelly, 213 Judge Building, Salt Lake City, Utah, September 15, 1942.

R.J.R. As a matter of information concerning an accident involving Mr. R. D. Hair in which his car was completely demolished and considerable of his merchandise lost or stolen.

Mr. Hair called me Saturday morning September 12th and informed me that he had had an accident twenty two miles north of Montpelier, Idaho. Since Mr. Hair did not give me all the details of the accident when he called me I naturally assumed that the accident was one of the usual nature. I had car number 8712 taken out of dead storage and serviced with the expectation of turning this car over to Mr. Hair. However, upon my arrival at Montpelier at 12:00 noon further details came to light upon my investigating further.

While Mr. Hair was traveling south on highway number 30, twenty-two miles north of Montpelier, he approached a semi-truck and trailer which was

(Deposition of E. A. Darr.)

over the center line thus causing Mr. Hair to drive onto the shoulder of the road which had become soft due to heavy rains. This threw his car somewhat out of control and in the interim he hit a rock with his right front tire [299] causing it to blow out. This then, caused his car to become completely uncontrollable. The car rolled over several times scattering tobacco and cigarettes all over the highway. A married woman passenger whom Mr. Hair had picked up was severely injured and was in need of immediate medical attention,—this he did not mention in his first report,—as was also Mr. Hair since he received a blow on his left ear. A passing motorist took them both to a hospital in Montpelier, Idaho, where medical attention was administered. After receiving medical attention Mr. Hair notified the Sheriff of the accident, but apparently before the wrecker arrived at the scene of the accident some of the merchandise was stolen by several passing motorists, according to eye witnesses at the scene of the accident. A list of the merchandise stolen will be sent to you along with his financial obligations to the jobbers.

After conferring with the doctor who was taking care of the woman involved I was informed that her condition was very serious and that she had a fifty fifty chance of surviving. Her injuries are internal and she is so seriously injured that X-rays are impossible at the present time.

Since Mr. Hair violated all Company rules and instructions concerning the carrying of passengers

(Deposition of E. A. Darr.)

I felt that I had to ask for his resignation which I did. His [300] resignation is enclosed with other papers relative to the accident.

In car number 8712 I took all the tobacco that was left and traded it in against outstanding receipts to a jobber located at Pocatello, Idaho.

Two bids which I received on the wrecked car are enclosed and of a time limit set by the bidders immediate action concerning acceptance is paramount. The towing charges on the wrecked car were paid by me and reported on my report. The car is in dead storage at Ford Garage at Montpelier, Idaho. Yours very truly L. R. Donnelly."

Mr. Davis: Now, the next question is on page 43.

Q. Is that the only report you received as to this accident?

Mr. Merrill: The same objection.

Mr. Black: The same objection for us.

The Court: Same ruling.

A. Well, we received a regular form of accident report that salesmen are supposed to submit when they have an accident, and we received one of those from Mr. Hair. In fact we received two, the first reports an accident and it doesn't show he was carrying a passenger.

Mr. Davis: Both of those reports are now introduced in evidence and have been received.

Mr. Merrill: All this was over our [301] objection.

The Court: Yes.

(Deposition of E. A. Darr.)

Mr. Davis: Now, on page 44.

Q. Were any other investigations made by the R. J. Reynolds Tobacco Company or anyone for them other than Mr. Donnelly's report?

A. No further investigation made since his resignation was immediately requested.

Q. I am talking about the accident, though. Was any other report made of the accident other than Mr. Donnelly's?

Mr. Merrill: Objected to on the grounds heretofore stated touching this type of testimony.

Mr. Davis: I will withdraw that question.

Q. Mr. Darr, was this automobile registered there in the name of the R. J. Reynolds Tobacco Company or Mr. L. R. Donnelly?

A. L. R. Donnelly.

Q. The title to the car, though, was really in the R. J. Reynolds Tobacco Company?

A. Legal title was in L. R. Donnelly.

Q. Well, is that the way you handle your cars in the territory of your salesmen, you put them in the name of the division managers?

A. I think that is universal. I think that is the general practice. [302]

Q. But the title to the car was registered in the name of L. R. Donnelly?                      A. That is right.

Q. But was really property of the R. J. Reynolds Tobacco Company?                      A. That is right.

Q. You say that you register all cars of the Company in the name of the Division Managers in the various territories?

(Deposition of E. A. Darr.)

Mr. Merrill: In addition to the standing objection to this testimony, I add the further objection that it is repetition.

The Court: The same ruling.

A. That is the general practice. There may be some exceptions.

Mr. Davis: The next question is one that you didn't permit to be answered in the interrogatories so I will pass that. The next is on page 46.

Q. Was there any reason,—I mean to say, was that any reason why the car would have been listed or registered in the name of L. R. Donnelly?

Mr. Merrill: The same objection and also that it is repetition.

The Court: The same ruling.

A. Cars are registered in Division Managers' names merely for convenience.

Q. Did you give your Division Manager, Mr. Donnelly, [303] instructions with reference to the salesman under him using the automobiles?

A. Oh, yes.

Q. The same instructions that you gave to Hair with reference to riding guests? A. Yes.

Q. And if your division manager, Mr. Donnelly, or any Division Manager found that a salesman was violating or knew of a violation of the salesman with reference to the hauling of guests or passengers, then it would be his duty to report that to you, would it not? A. Yes.

Q. And if Mr. Donnelly had any such evidence



(Deposition of E. A. Darr.)

there, he failed to report that fact to you, didn't he?

A. That is right. We have had no such report.

Q. You never heard or no report ever came to you that Mr. Hair ever hauled any passengers, ever hauled any guests in the Company's car with the exception of his wife, when he brought her to a station and had the first wreck in 1939, and this last wreck involved in this litigation in which Mrs. Newby was killed?

A. They are the only cases that have come to my attention or the attention of the Company.

Mr. Davis: The next quesiton I take it, Your Honor would not permit to be answered. Now, the top of page 49. [304]

Q. Was Montpelier, Soda Springs and Grace, Idaho, in Rulon D. Hair's district or territory on September 11, 1942?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial and not proper cross examination, in addition to the other grounds.

The Court: You may read the answer.

A. They were in his assigned territory on September 11, 1942.

Mr. Davis: That is all the cross examination. Does counsel desire that I read the redirect examination at page 49 of the deposition?

Mr. Merrill: Yes and the direct examination.

Mr. Davis: I am asking now about the questions at page 49, the redirect examination.

Mr. Merrill: Yes.

(Deposition of E. A. Darr.)

Redirect Examination

Q. Mr. Darr, I direct your attention to "Defendant's exhibit number I" heretofore introduced in evidence, being entitled Salesman's Agreement to who car is delivered, and ask you if you know the two signatures appearing on this instrument?

A. I do.

Q. Whose signatures are they?

A. One is the signature of R. D. Hair, and the other is the signature of L. R. Donnelly. [305]

Q. Where has this paper been kept since it was executed, Mr. Darr?

A. In our files, as a permanent record.

Q. Are those files kept under your supervision as Sales Manager for the R. J. Reynolds Tobacco Company?

A. They are.

Mr. Davis: There was an exhibit introduced here at the taking of the deposition, it was the one that was identified and it was read to the jury, exhibit I.

Mr. Merrill: We ask permission without waiving our objection to the manner in which this has been taken up. We ask that the testimony on direct examination be presented to the jury.

The Court: It may be presented as the evidence of the defendants. It will be placed in the record as your evidence. Whether you want to do it at this time or on the presentation of your case would be up to you.

Mr. Merrill: We will present it now. Whereupon the direct examination in the deposition of Mr. Darr was read by Mr. Merrill.

(Deposition of E. A. Darr.)

Direct Examination

Mr. Merrill: This is the direct examination of E. A. Darr.

Q. Will you please state your name? [306]

A. E. A. Darr.

Q. Where do you reside?

A. Winston Salem, N. C.

Q. What is your present employment, Mr. Darr?

A. Manager of the Sales Department of the R. J. Reynolds Tobacco Company.

Q. How long have you been connected with the R. J. Reynolds Tobacco Company?

A. Twenty-three and a half years.

Q. How long have you held the position as Sales Manager? A. Since December, 1937.

Q. Do you hold any other position with the R. J. Reynolds Tobacco Company other than sales manager?

A. I am also a director of the Company, having been elected in December 1937.

Q. What are your duties, generally, as Sales Manager, with respect to the Company's salesmen?

A. I have general supervision of all the salesmen all over the United States.

Q. Had Rulon D. Hair been acting as a salesman for the R. J. Reynolds Tobacco Company prior to September 11, 1942? A. Yes.

Q. When did he first become a salesman for the Company, if you know the approximate date? [307]

A. He was employed July 20, 1937.

(Deposition of E. A. Darr.)

Q. Mr. Darr, is there any other officer of the Company besides yourself who would know anything about the transactions of Rulon D. Hair in his capacity as a salesman for the Company?

A. No.

Q. To which officer of the Company would such information come?      A. To this office.

Q. Is there any other officer of the Company other than to yourself to whom such information would come?      A. None.

Q. Which officer, if any, of the Company would have supervision of the instructions or rules that might be given to Rulon D. Hair from time to time regulating his activities as salesman for the Company?      A. No one *by* myself.

Q. Was a Chevrolet panel truck owned by the R. J. Reynolds Tobacco Company turned over to Mr. Hair in February of 1942 for his use as a salesman for the company?

A. That is correct, February 8, 1942. He had previously had a car.

Q. He had previously had a car that belonged to the Company.

A. That is right. This is just another car, a new car.

Q. What instructions, if any, Mr. Darr, were given by [308] the R. J. Reynolds Tobacco Company to Mr. Hair as to hauling or carrying guests or passengers in this truck?

A. These instructions were contained in a

(Deposition of E. A. Darr.)

printed form which was signed by Hair at the time the car was turned over to him.

Q. You have before you the printed form signed by Mr. Hair, about which you have just testified?

A. Yes.

Mr. Merrill: We now re-offer at this time for the purpose of clarification the exhibit offered in the deposition which has been offered and read to the jury.

The Court: Very well, it may be considered as admitted and read to the jury at this time.

Q. Was the Chevrolet truck referred to in this paper writing delivered to Mr. Hair by the Company at the time this paper was signed?

A. Simultaneously.

Q. Mr. Darr, is the prohibition against the hauling of passengers and guests a general rule of the R. J. Reynolds Tobacco Company, applicable to all salesmen using Company owned automobiles?

A. It is.

Q. Is that or is that not a fixed rule of the company? [309]      A. Fixed rule.

Q. Now, in addition to the paper writing offered in evidence as defendant's exhibit number 1, were any other written instructions given by the R. J. Reynolds Tobacco Company to Mr. Hair with respect to his hauling guests or passengers in any vehicle belonging to the R. J. Reynolds Tobacco Company?

A. It is a matter of constant practice for the Company to keep salesmen reminded, both by direct



(Deposition of E. A. Darr.)

communications and through division managers and department managers who supervise salesmen's work, that under no circumstances must they carry any passengers with them other than employees of the Company. On that point here is a form letter dated November 4, 1937, which Mr. Hair received and of which we have his signed acknowledgment, where that rule is again called to his attention in the last paragraph, reading as follows: "You must not carry other passengers with you when using the car, except your Division Manager or an employee of the Company."

Q. Was a copy of the letter to which you just referred sent to Mr. Hair.

Mr. Merrill: I will read that again.

Q. Was a copy of the letter of instructions to which you have just referred, sent to Mr. Hair?

A. It was. [310]

A. *It was.*

Q. Is this paper to which you have just referred, an exact copy of the letter of instructions and directions sent to him?

A. That is an exact copy.

Mr. Merrill: The defendants Reynolds Tobacco Company and Donnelly now offer their exhibit number 2 in evidence and ask that it be taken as a part of this deposition.

The Court: It may be admitted.

The Exhibit was read at this point by Mr. Merrill.

Mr. Merrill: "Directors: James A. Gray, President. R. E. Lasater, Vice-President; J. W. Glenn,

(Deposition of E. A. Darr.)

Vice President; John C. Whitaker, Vice President; M. E. Motsinger, Secretary; S. Clay Williams, Chairman Board of Directors; W. N. Reynolds, Chairman Executive Committee; R. C. Haberkern, Purchasing agent; L. F. Owen, Traffic Manager; H. S. Stokes, Supt. Leaf Processing; P. Frank Hanes, Counsel; E. A. Darr, Manager Sales Department; R. J. Reynolds Tobacco Company, Winston Salem, N. C. November 4, 1937. S 22 C C

To our Salesmen operating automobiles.

We are sending you herewith accident report blanks. In case of accident, make out report of accident in triplicate, and send all three copies to [311] your division manager. In case you have a serious accident, report it to us by wire and follow up your wire with a report of accident as above requested by first mail.

In filling out the report blanks it is imperative that you answer fully every question appearing thereon. If an accident occurs and you are not at fault you should endeavor to secure settlement from the party causing the accident on the spot. As we do not carry insurance covering damage to our car, we therefore have to look to the other party for damages sustained by us.

You must not carry other passengers with you when using the car, except your Division Manager or an employe of the Company.

R. J. Reynolds Tobacco Company."

Mr. Merrill: At the bottom in quotation marks appear the words "I'd walk a mile for a Camel".

(Deposition of E. A. Darr.)

Q. Mr. Darr, do you have the signed acknowledgment of the letter of instructions just referred to which you received from Mr. Hair.

A. The original acknowledgment was sent to lawyers in connection with a previous case in 1939.

Q. Are they the same attorneys who are defending this present suit?           A. Yes.

Q. As far as you know, do they now have that signed [312] acknowledgment by Mr. Hair?

A. It was sent to them?

Q. Did you have any knowledge or information that these instructions and rules of the Company with respect to carrying guests or passengers had been violated by Mr. Hair at any time?

A. In one instance only, in connection with an accident that the salesman had in April 1939, when it was found that he had taken his wife and daughter in a Company car to the railroad station and had an accident on his return home?

Q. What action, if any, did the Company take with respect to that violation, Mr. Darr?

A. We gave serious consideration to getting Mr. Hair's resignation; but after considerable thought, I decided to give him another chance. But we penalized him to the extent of making him pay \$70.95 repair bill to cover damage suffered by the Company car.

Q. What instructions, if any, were given him at that time as to his observing this regulation or rule?

Mr. Davis: Objected to for the reason that the answer is hearsay, I also object that it is incom-

(Deposition of E. A. Darr.)

petent, irrelevant and immaterial, and also that it is hearsay.

Mr. Merrill: It would come within the exception, it is followed up by the letters introduced [313] as their exhibits.

The Court: Objection overruled, you may proceed.

A. He was told by his Department Manager that if he was ever found to be carrying passengers in the future, there would be no second chance.

Q. Do you or the Reynolds Tobacco Company have any knowledge or information about any other occasion on which Mr. Hair hauled or carried any passengers or guests in this truck or any other truck owned by the Reynolds Tobacco Company?

Mr. Davis: Object to the form of the question as being bad and calls for a conclusion of the witness, he says "Do you or the Reynolds Tobacco Company". He is not the Company and this is a double question, I object as improper and calls for a conclusion of the witness.

The Court: It will be admitted and the jury can be the judges of the weight to be given to it.

A. None.

Q. Was any report ever made to you or to the Company to the effect that Mr. Hair had hauled a woman in the Company's truck or car in Dubois, Idaho, or at any other place?

A. No such report ever reached me of the Company. [314]

(Deposition of E. A. Darr.)

Q. I direct your attention to allegations in the complaint that the R. J. Reynolds Tobacco Company knew that Rulon D. Hair was in the habit of hauling guests in the company's truck contrary to instructions, and I ask you if that allegation is true?      A. It is not true.

Q. Have you or the Company ever been informed of Mr. Hair being arrested on a charge of reckless driving?

Mr. Davis: We object to this in so far as the Company is concerned. This witness could only know whether he had been informed.

The Court: Of course, the witness is not here, I think I will permit it to go in and the jury can give it such weight as they feel it is entitled to. They will be the judges of that.

A. No such report has reached me or the Company.

Q. Did you or the company ever receive any information indicating that Mr. Hair was a careless or reckless driver?      A. Never have.

Q. What reports, if any, have you or the R. J. Reynolds Tobacco Company received concerning any accident in which Mr. Hair was involved while operating a company truck or any other vehicle?

A. None, other than the one in April, 1939, previously mentioned. [315]

Q. Is that the case in which some pedestrian was killed?      A. Yes.

Q. What has Mr. Hair's record been with the



(Deposition of E. A. Darr.)

Company as to being a careful and competent driver, Mr. Darr?

A. He has a record since April 1939, up to September 11, 1942, of having had no accident in connection with the Compnay car, and has received letters of commendation along with merchandise awards in April 1940, April 1941 and April 1942, which he won as a result of having maintained a clear record.

Q. What form of recognition was given to him for this record?

Mr. Davis: Objected to as being immaterial and a self serving declaration.

The Court: I think it is immaterial. Objection sustained.

Q. State whether or not the originals of those letters were mailed from this office, from your office as Sales Manager, and under your supervision, to Mr. Hair on the dates indicated?

Mr. Davis: We make the same objection to that.

The Court: The same ruling.

Q. Are those papers you have before you the exact carbon copies of the originals of the letters mailed to Mr. Hair? [316]

Mr. Davis: We make the same objection.

The Court: The same ruling.

Mr. Merrill: The defendant Reynolds Tobacco Company offers the three papers referred to by the witness and ask that they be marked for identification, the marks now being three, four and

(Deposition of E. A. Darr.)

five. I will ask that they be marked exhibits 19, 20 and 21.

The Court: They may be so marked.

Mr. Merrill: We now offer the exhibits marked 19, 20 and 21.

Mr. Davis: We object to the introduction as the objection has been sustained to the testimony regarding them. They are self serving and immaterial and incompetent.

The Court: **Sustained.**

# DEFENDANT'S EXHIBIT No. 19

Rejected Oct 22 1943

Deft's Exhibit #1

Received

9/30/43 Reg.

Mar 5

1:30

.....Department

(Undecipherable)

MWM

G.R.B.

E.F.M.

Noted ZEB

File Proper

J.A.W.

3/18

Expense

Mar 18 1942

(Original)

Salesman's Agreement To Whom Car Is Delivered

R. J. Reynolds Tobacco Company,

Winston-Salem, N. C.

This will certify that there was delivered to me this 8 day of February, 1942, at Salt Lake City (City) Utah (State) one Sedan Del, Chev6 1941 Model A.A. Sedan Del, Motor Number A.A. 517606, Silver Tag Number 9020 with the regular and

(Deposition of E. A. Darr.)

special equipment, as fully explained in your letter of instructions which I have carefully noted, and which I do hereby agree to observe in operating car, and same will be followed to the best of my ability in making my services of more value as a salesman, while the car is in my charge. I further agree that I will be responsible for the car, its parts and equipment; and upon request will turn same over to you, your successor, or a duly authorized representative of R. J. Reynolds Tobacco Company.

I further agree that I will not use the car for any other purpose than that of furthering R. J. Reynolds Tobacco Company's business as directed by my Division Manager. I understand that under no consideration am I to permit anyone save and except an employee of R. J. Reynolds Tobacco Company to ride with me in the said car.

R. D. HAIR

(Salesman Sign Here)

Witness L. R. DONNELLY

(Division Manager's Signature)

G.R.B.

E.B.W.

J.A.W.

3/5

E.F.M. 3/17

(Deposition of E. A. Darr.)

DEFENDANT'S EXHIBIT No. 21

Rejected Oct 22 1943

June 12, 1940.

Expense  
Jun 13 1940

Mr. R. D. Hair,  
209 South 7th St., #4  
Pocatello, Idaho.

Dear Mr. Hair:

We are greatly pleased at being able to send to you the enclosed card and key ring token as evidence of the fact that you have operated your Company car for a period of twelve months ending April 15, 1940 without an accident.

Thousands of automobile drivers in America are carrying or wearing tokens like this. Some have them engraved for "2 years" and a few for "3 years". This simply means that for one year—or two years or three years—they have successfully done their share towards saving lives on the highways by keeping themselves out of accidents. They have so well lived up to the rules and ideals of safe driving that they have been able to keep out of even those scrapes for which others would have been to blame.

These No-Accident Awards are not easy to win! They almost always mean that the operator of an automobile who has merited these awards has put real thought and effort into the matter of driving safely. They are not given for "good intentions", but are given only to those who have "delivered

(Deposition of E. A. Darr.)

the goods"—a reward for definite accomplishment in dodging the hazards that are encountered daily on the highways.

So we congratulate you on your clean twelve months' record, and we hope that this time next year we can exchange the enclosed for a two year token.

With best wishes, we remain,

rdm—edr

lrd—ccr

Deft. Exhibit 3

9/30/43 Reg-

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Q. Mr. Darr, I direct your attention to an allegation in the complaint that the R. J. Reynolds Tobacco Company knew that Rulon D. Hair was a careless, reckless, and incompetent driver of an automobile, and I ask you if that allegation is true?

A. It is not true. On the contrary, we have commended him because no reports of any accidents or improper driving have ever reached us.

Q. Did you or the R. J. Reynolds Tobacco Company ever acquire any knowledge or information that Mr. Hair was in the habit of hauling guests in the company's truck? [317] A. No.

Q. As far as you know or the Company know, did he have any such habit?

A. Not that we knew of.

Mr. Merrill: The cross examination has been read into the record.



Mr. Davis: Now I want to present a matter in the absence of the jury.

(Jury excused with admonition.)

Mr. Davis: The question to take up in the absence of the jury is as to the admissibility of the conviction in Pocatello and any other convictions of the defendant Hair.

The Court: The only question I see is as to the admissibility as to the defendants Tobacco Company and Donnelly. Ordinarily it would be prejudicial and I wonder if counsel have any cases that apply to a plea of guilty. After considering this matter, the Court having heretofore admitted the testimony of Sheriff Close in connection with the reckless driving of the defendant Hair in Clark County with the reservation in the ruling, it is now the ruling of the Court that the testimony will be admitted as to the defendants Tobacco Company and L. R. Donnelly.

Mr. Merrill: To which defendants [318] R. J. Reynolds Tobacco Company and L. R. Donnelly specifically except and urge that at the time the testimony offered by the witness Close was given, the ruling of the Court was that it was not admissible against the Tobacco Company and Donnelly unless it should be connected up with additional proof, indicating that it was necessary that there should be knowledge brought to the defendants Donnelly and the Tobacco Company that such occurrence had happened, and that under such ruling the said defendants were in the position where

they could not either object to the testimony offered or cross examine the witness Close, and that the witness Close has now, and immediately following his examination, been excused and departed from the Court room, and we now object on the further ground that there is no evidence in the record showing or tending to show or reasonably indicating that the defendants Donnelly or the Tobacco Company knew or had any knowledge of any kind or character as to the conduct or actions of Hair in Dubois, Idaho, as suggested by the witness Close, but on the contrary shows definitely that they did not have such information.

The Court: The objection is overruled and exception granted. We will recess at this time until 1:30. [319]

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1:30 P.M. October 22, 1943

The Court: After checking the record the last ruling of the Court as to the admission of the testimony of Sheriff Close, the record will stand in accordance with the original ruling.

Mr. Davis: And it stands as it was. At this time we offer in evidence plaintiff's exhibit 22 being the judgment docket of the Probate Court of Clark County.

Mr. Black: We object on the part of the defendant Hair on the ground that it purports to be a certified copy of the Probate Court. It is incompetent, irrelevant and immaterial, and cannot

be received as evidence in this Court, that Court not being a court of record.

The Court: As to the defendant Hair, the objection is sustained.

Mr. Merrill: On all grounds.

The Court: On the ground that it is incompetent, irrelevant and immaterial as to that defendant.

Mr. Merrill: The defendants Reynolds Tobacco Company and Donnelly object on the following grounds;

First; that it is immaterial and incompetent, particularly [320] because it is an attempted certified copy of the purported judgment of the Probate Court sitting as a Justice Court and therefore in that situation it is not a court of record and accordingly under the statute controlling such matters a certified copy is not admissible for any purpose whatever and is not to be accredited the dignity of a certified copy that a Court of record would be given.

Second: Upon the ground that it is incompetent, irrelevant and immaterial under the issues in this case particularly because there is no proof in the record of any kind or character effecting these two defendants showing or tending to show any act or thing which came to their knowledge, or of which they were acquainted or by reasonable diligence could have been acquainted in so far as this incident is concerned; that it is incompetent, ir-

relevant and immaterial because there has been no competent testimony adduced in this record in so far as these two defendants are concerned tending to show that they had any knowledge of any kind or character touching anything that Hair may have done in Clark County, and particularly of this incident; there is no testimony in this record against these defendants which has been connected up that would in any sense bind these two defendants in any of the matters concerned with said exhibit, and lastly, we further object on the [321] ground that this exhibit is incompetent, irrelevant and immaterial under any of the issues in this case as against these defendants and that the same is prejudicial.

The Court: It may be admitted.

Mr. Davis: I desire to read the exhibit at this time: "Probate Docket. Case 258. State of Idaho, Plaintiff, vs. B. R. Hair, Defendant.

In the Probate Court of Clark County, State of Idaho. Before Honorable William A. Patt, Probate Judge. Be it remembered that on this 19th day of July 1939. Complaint in writing on oath of Sid Close, Sheriff was filed, alleging that B. R. Hair of Soda Springs, Idaho, on or about the 19th day of July 1939 at Dubois in the County of *State* of Idaho, then and there being did then and there commit a misdemeanor, to-wit: by driving a motor vehicle on the public highway in a reckless manner. 18th day of July 1939, Warrant issued and delivered to Sid Close, Sheriff, for service. 19th day of July 1939 warrant returned. 19th day of July

1939, Defendant in Court, complaint read, and to said complaint he entered a plea of guilty. Case set for trial 10 o'clock A. M. Defendant fined \$50.00 and \$5.00 court costs. \$55.00 fine and court costs paid. The defendant discharged. [322] William A. Patt, Probate Judge. 19, subpoena issued for.....witness on the part of the prosecution, delivered to.....for service. ....19 , Subpoena returned, served on ....19 , Jury.....by..... and venire issued to.....for service, returnable .....19 , at....o'clock M.

Attorneys, John Black, Pocatello, Idaho for Plaintiff .....for defendant.

Costs, Officers' costs \$3.00 Sheriff fee \$2.00 total \$5.00 Witness fees,—Plff. Total Witness fees—Deft. Total Jurors' fees. Total. Total fees.

State of Idaho,  
County of Clark—ss.

I, J. N. Hoppes, Probate Judge of the Probate Court, in and for Clark County, State of Idaho, do hereby certify that the above and foregoing is a full, true and correct copy of the judgment docket in the case of the State of Idaho, vs. B. R. Hair, as appears from the Book 1 Probate Docket Criminal, Clark County, page 258, and that the Judgment Docket from which said copy was made is the official criminal docket of the Probate Court of Clark County, State of Idaho.



In Testimony Whereof, I the said Probate Judge have hereunto set my hand and affixed the seal [323] of said Court this 8th day of October, 1943.

(Seal Probate Court) J. N. Hoops, Probate Judge.

Mr. Merrill: Could I add another ground to the objection?

The Court: You may.

Mr. Merrill: L. R. Donnelly and the Reynolds Tobacco Company further object to the introduction of plaintiffs' exhibit 22., upon the ground that it does not purport to *effect* or have anything to do with Rulon D. Hair or R. D. Hair living at Pocatello, Idaho, and employee of the defendants at that time, but it recites that it is a person known as B. R. Hair of Soda Springs Idaho, and could not and does not give any notice to anyone interested in the employee of the defendants, one R. D. Hair of Pocatello, Idaho.

The Court: Counsel contends that it is not the same party.

Mr. Merrill: It is a question of how this could give notice to any prudent person.

The Court: *I will* I will overrule the objection and admit it.

Mr. Davis: Plaintiff rests.

Mr. Smith: We desire to make a motion to strike certain showings in regard to the Pocatello and the Dubois incidents.

The Court: You may proceed. [324]

Mr. Smith: Comes now the defendants Reynolds Tobacco Company and L. R. Donnelly and moves the Court to strike all the evidence adduced herein pertaining to the so called Clark County or Dubois incident of about July 19, 1939, including exhibit, plaintiff's exhibit 22, and also the evidence pertaining to the so called Myers incident alleged to have occurred in Pocatello, Idaho about April 15, 1939, wherein the defendant Rulon D. Hair was involved and particularly the testimony of Sid Close and the testimony of F. H. Smullen and Ben Buskirt, and the testimony of L. R. Donnelly on cross examination so far as it has reference to the Pocatello incident, as well as the testimony of any other witnesses, if any, referring thereto, upon the following grounds;

First; That the showing or attempted showing of the plaintiffs is wholly incompetent to prove or attempt to prove that Rulon D. Hair on September 11, 1942 was an incompetent, driver of an automobile, in that a certain isolated incident, even if known, is wholly insufficient to prove habit of negligence or to prove that Hair was a reckless, careless and incompetent driver, and that attempted showing is wholly incompetent and insufficient to prove any negligence whatever on the part of the Reynolds Tobacco Company or L. R. Donnelly in their, or either of their employment, from and after [325] April 15, 1939, to and including September 11, 1942, in that a single and occasional act of negligence such as shown to have been committed

in Pocatello on April 15, 1939, coming to the knowledge of the employer, with no other act of negligence coming to the attention of the employer, of any negligence or incompetence on the part of Mr. Hair would in no wise render him unfit for employment so far as these two defendants are concerned, nor render them guilty of negligence in retaining him in their employ.

Second; on the further ground that as has been shown by the evidence thus far adduced that the incident in Dubois, Clark County, was not known to the defendant Reynolds Tobacco Company or L. R. Donnelly or either of them and therefore could have no bearing whatever upon the issue as to the knowledge of the employer of any alleged incompetency of said Rulon D. Hair in the driving of an automobile.

The Court: The objection is sustained as to the testimony of Sheriff Close, all other matters will be admitted, the objection is overruled as to all other matters.

Mr. Merrill: We understand that the testimony of Sheriff Close is stricken from the record.

The Court: The jury will not consider it in any way. [326]

Mr. Merrill: And that includes exhibit 22.

The Court: The exhibit remains in the record. Just the testimony of Sheriff Close is stricken, there seems to be nothing in the record,—no evidence to show that was conveyed to the defendants Donnelly or the Tobacco Company. The other is

allowed to remain on the ground that it is a record that would or could give notice. That is a matter for the jury.

Mr. Merrill: May we have an exception to that portion of the ruling of the Court adverse to us on the motion to strike.

The Court: Exception will be granted.

(Opening statement by Mr. Black and Mr. Merrill.)

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### RULON D. HAIR

being called as a witness on the part of the defendants, after being first duly sworn, testifies as follows:

#### Direct Examination

By Mr. Black:

Q. State your name. A. Rulon D. Hair.

Q. You are one of the defendants?

A. Yes sir.

Q. How old are you? A. Thirty-one.

[327]

Q. Where do you live?

A. Salt Lake City, Utah, at the present time.

Q. Prior to the time of this accident on September 11, 1942, where did you live?

A. I was living at Pocatello, Idaho.

Q. How long had you lived at Pocatello?

A. About five years, four and a half years.

Q. During the time you lived in Pocatello what was your occupation?

(Testimony of Rulon D. Hair.)

A. I was salesman for the R. J. Reynolds Tobacco Company.

Q. Since the 11th of September 1942,—what is your present occupation?

A. At the present time I am driving truck hauling coal from Helper mines to Salt Lake City.

Q. Directing your attention to Mrs. Newby referred to in the complaint, did you first meet her on the 11th of September 1942?      A. No.

Q. When did you meet her?

A. The first time I ever met her was about,— I guess it was about one month previous.

Q. Previous to what?

A. To the 11th of September.

Q. Had you met her any time after that until this accident occurred?

A. On the afternoon of the 10th of September.

[328]

Q. What year?      A. 1942.

Q. Where was that?

A. In front of the Ideal Billiards in Montpelier, Idaho.

Q. Was that in some building or on the street?

A. On the street.

Q. Did you meet her again that day any place?

A. I met her again about 9 P.M. the same day.

Q. Where was that?

A. In front of my cabin, at the Burgoyne cabins.

Q. What town?      A. Montpelier, Idaho.

Q. Did you go any place from there with her or she with you?      A. To the Areo Club.



(Testimony of Rulon D. Hair.)

Q. Where is that?

A. About six miles up the canyon on the Geneva highway.

Q. Is it a night club or restaurant?

A. A general restaurant and dancing place.

Q. Do you know who ran the place?

A. Jimmie and Minnie I think.

Q. McGee was it?

A. They run a restaurant in town.

Q. Did anyone go with you?

A. A couple one was named Rasmussen and I don't recall the other's name.

Q. At whose instance was Mrs. Newby with you at that time? [329]

A. When I first met her at the Ideal Billiards she recalled the first time I met her at the Areo Club, introduced by her sister, I knew her sister through a business connection, she recalled when I first met her. She said she was at the Club a couple of nights before and what a terrible time she had. I made the statement that I was going to dinner and she said "how about going along" and I said that there would be a couple of other men along too and that I had some reports to make out and for her to call me later in the evening.

Q. Was it following that telephone call that you went to the club?

A. We got the reports completed shortly after the telephone call and I told these fellows about——

Mr. Davis: We object to what he told these fellows.

(Testimony of Rulon D. Hair.)

A. We changed our plans and I decided to go down town and eat.

Q. What did you do?

A. We went to the Burgoyne cafe and ate dinner.

Q. Was Mrs. Newby with you?           A. No, sir.

Q. When did you next see her?

A. She was walking up the street by the service station close to the cabin.

Q. Then it was from there that she and you and these [330] traveling men went to the club?

A. Yes, sir.

Q. How far is that from Montpelier?

A. About six miles.

Q. How long did you remain up there?

A. Stayed there until they closed and for a while afterward.

Q. What time did you leave the club?

A. I wouldn't know for sure but it was probably two or three o'clock.

Q. That would be in the morning of what day?

A. Of the 11th of September.

Q. Is that the morning of the same day this accident occurred?           A. Yes, sir.

Q. And who was with you when you left the club?

A. Just Mrs. Newby and myself when we left the club.

Q. Where did you go?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial as not tending to show any defense here, or any reason for the happening of this

(Testimony of Rulon D. Hair.)

accident unless there is some purpose that is not apparent now.

Mr. Black: It is to show how she came to be a guest and to show her participation.

The Court: He may answer.

A. From the club we drove to the street across from the cabin where I was staying. [331]

Q. Did you stop there? A. Yes sir, we did.

Q. What did you do there?

A. I asked her if I could get her hat. She had left her hat in our cabin.

Q. These cabins, yours and the other men, were they close or adjoining?

A. One other salesman and myself shared a double cabin.

Q. Did she go into the cabin with you?

A. No, sir.

Q. What did you do?

A. I didn't go into the cabin?

A. What did you do?

A. I asked if I should go after her hat and she said no that she was not ready to go home, and why didn't we go to the Oasis Club at Soda Springs and dance some more.

Q. What did you do?

A. I said that I had to work,—that I had work to do the next morning and shouldn't do it and finally I consented to take her.

Q. What did you do?

A. We drove to Soda Springs.

(Testimony of Rulon D. Hair.)

Q. What time did you get there?

A. At five o'clock.

Q. In the morning? [332] A. Yes, sir.

Q. On what date was that?

A. The 11th of September.

Q. Did Mrs. Newby remain there during the morning before you started back on the trip you had this accident?

A. Yes, sir.

Q. You remained in Soda Springs during that morning?

A. Yes, sir.

Q. What time did you leave Soda Springs to go on this trip just preceding this accident, this trip back to Montpelier?

A. About two-thirty, I didn't notice the time.

Q. Where did you first go when you left Soda Springs?

A. From Soda Springs I went to Grace, Idaho.

Q. What was the purpose of going back to Montpelier?

A. The main purpose was to take Mrs. Newby home and get my luggage.

Q. When you started out from Montpelier, where did you go first?

A. You mean when we started from Soda Springs?

Q. From Soda Springs? A. To Grace.

Q. Why?

A. One of these traveling men, the one that had the adjoining cabin to me had made the remark that he had to stop in Grace and call on a few dealers, and I [333] thought if he was there I could have

(Testimony of Rulon D. Hair.)

him inform my wife that I would be later than usual getting in that night.

Q. Your wife was where? A. Pocatello.

Q. Did you see him in Grace?

A. No sir, he had left.

Q. What did you do then?

A. Started driving to Montpelier.

Q. What was the condition of the weather?

A. Cloudy and raining quite hard.

Q. What was the condition of the weather, that is as to how it continued until this accident?

A. It rained to the time of the accident.

Q. You are familiar with the road from Soda Springs to Montpelier? A. Yes, sir.

Q. What is the distance from Soda Springs to Montpelier? A. Thirty-one miles I think.

Q. What kind of a road is it?

A. Surfaced road.

Q. What is the condition of the road as to whether it is smooth or rough when it is raining?

A. Stretches where it is smooth and some where it is rough.

Q. As to the place where this accident occurred what is the condition of the pavement there? [334]

A. It would be smooth all the way through there.

Q. As you left Soda Springs who was riding with you? A. Mrs. Newby.

Q. How many seats in that car? A. One.

Q. Where was she in the car?

A. Sitting on the passenger side.

Q. Who was driving the car? A. I was.



(Testimony of Rulon D. Hair.)

Q. From her position was she able to see anything that you could see, looking out ahead?

A. Yes, she could.

Q. As you drove from Soda Springs to the place of the accident state whether she made any protest or objection to your driving?

A. Never made any remarks about the driving at any time.

Q. From Soda Springs to the place of the accident did she make any remark about your driving?

A. No, sir.

Q. Was there any money paid for you taking her, or was this a gratuitous guest?

A. There was no money paid, no sir.

Q. Prior to the time you reached the point where this accident occurred do you remember passing some vehicle on the highway?

A. I remember passing a vehicle, yes sir. [335]

Q. Do you remember what vehicle it was?

A. No, at that time I didn't.

Q. You heard Frank McGuire, might that have been that you passed? A. Yes, sir.

Q. You heard his testimony that you were driving at a rate of speed, what is the fact as to your speed you passed that car?

A. I was driving about thirty-five before I passed him, I might have speeded up when I passed him.

Q. What about your speed after you passed him in going to the place of this accident?

A. I never watched the speedometer but it was never over thirty-five or forty at the most.

(Testimony of Rulon D. Hair.)

Q. As you approached the place you met this truck what happened, what would you say?

A. As I approached this spot this semi-truck with a big green body was coming toward me, a little over the yellow line, looked as if he continued to come over a little more and I turned off just to give him a place to pass and in doing so I must have sunk into the soft shoulder. I got off a little too far off the oil surface. At that time I heard a report like a tire blew out. I put it back on the road and this back end of the truck was heavy with tobacco. I went into a swerve, I didn't think I went off the road again. I was trying [336] to keep it on the oil so it wouldn't go into the borrow-pit. I had experience with it before. All at once it gave a lurch, I must have got off the brake and got on the accelerator and after that it went right over.

Q. Where did the lurch of the car occur?

A. Just before I went off the pavement.

Q. To what do you attribute the skidding of the car there after you tried to avoid being hit by this car?

A. As near as I can tell the skidding would be from the swerving of the back end of car and the front end together. I don't see any other reason for skid marks other than the brakes which I wasn't applying hard at that time.

Q. You were trying to keep the car from going off the road on one side or the other?

A. Trying to keep it from going off the road.

(Testimony of Rulon D. Hair.)

Q. At the time this happened it was still raining there?      A. Yes sir.

Q. Describe to the jury how this truck was loaded, as to the weight or the heft of it.

A. It probably would weigh about four thousand pounds.

Q. The way that truck was built how much of the weight was on the hind wheels?

A. Most of the weight rides on the back wheels.

Q. The coach part that you put the goods in, where does that come with reference to the back of the front seat [337] the part *the* contains the goods?

A. Immediately back of the front seat there is a space of about ten inches between the screen and the driver's seat, that is left for advertising matter.

Q. There is a screen that screens off the part that the merchandise is in?      A. Yes sir.

Q. Calling your attention to Plaintiff's exhibit 5 is that a picture of the truck that was involved in this accident?      A. Yes sir.

Q. That shows the relative position of the seat in the car and how much of the weight is in the back of the truck?

A. It gives a pretty good idea, yes sir.

Q. Was the back of the truck,—strike that—what was loaded in the back end of the truck?

A. A variety of chewing tobacco, smoking tobacco and cigarettes. At that time there was quite a lot of chewing tobacco.

Q. Was it full or empty, the back end, that compartment?

(Testimony of Rulon D. Hair.)

A. The back end was full clear to the door.

Q. In your experience in driving trucks, does the weight of the back end have anything to do with controlling the car as you drive it?

A. It does if there is anything like a blown out tire [338] or the road is slick or if you go off on the shoulder of the highway, it would cause it to swerve.

Q. More than an ordinary car?

A. Yes sir.

Q. What position was the car in when it finally stopped?

A. The wheels were in the air, it was upside down.

Q. You and Mrs. Newby were still in the front seat compartment?      A. Yes sir.

Q. Some witness testified that the horn was blowing?

A. The horn, no doubt, was stuck from a short or something, it was blowing.

Q. What did you do right after this occurred when the car went over and stopped. What was the fact as to whether you got hurt?

A. I had the side of my head and through here (indicating) injured. It was quite difficult to get out of the door on the driver's side. I had quite a time getting the door open; the seats were on top of us, and all I could do immediately was to try and get out and when I got out I went right around to see if I could get the other door opened and get Mrs. Newby out.

Q. What did you do with reference to that?

(Testimony of Rulon D. Hair.)

A. I couldn't get that door open, it was jammed shut. I was looking along the highway to see if someone was coming to try and get some help, and just after that [339] Mr. McGuire drove up.

Q. That is the Mr. McGuire who testified here?

A. Yes sir.

Q. What did you do then?

A. Asked if he could help me get her out. She was on the opposite side, and he helped me to get Mrs. Newby out of the car?

Q. What did you do then?

A. I asked if he couldn't determine what was causing the horn to honk and he didn't know any more than I did and we left the horn honking and took Mrs. Newby to the hospital.

Q. Did you accompany him and Mrs. Newby to the hospital?

A. Yes sir.

Q. She was taken to the hospital?

A. Yes sir.

Q. At Montpelier?                      A. Yes sir.

Q. What time of the evening was it when you got to the hospital, approximately?

A. It was probably around five o'clock.

Q. Had it quit raining at that time or was it still raining, if you remember?

A. I don't recall, but it was still dark and cloudy.

Q. Now, before you go any further, I want you to describe to the jury that semi truck that you met, what kind [340] of looking vehicle was it?

A. It was a large green cab compartment and part rests on the back four wheels of the tractor



(Testimony of Rulon D. Hair.)

part, probably stands about eleven feet high and about eight feet wide. It extends over the dual wheels on each side.

Q. Dual wheels on it? A. Yes sir.

Q. It is pulled by an engine part and the part they store good in is built up.

A. Yes, and rests on the back wheels of the tractor part.

Q. Did the man driving that stop at all?

A. No sir.

Q. Did you ever see that truck after that?

A. No sir, I didn't. He just passed me up, probably didn't know what was going on.

Q. You didn't see him since that time.

A. No sir.

Q. Did you notice the speed he was driving as he approached you?

A. I couldn't see the speed he was driving at.

Q. After Mrs. Newby was taken to the hospital what did you do with reference to her, if anything?

A. What was that.

Q. After Mrs. Newby was taken to the hospital, what did you do with reference to her?

A. I waited in the waiting room for about an hour to see [341] if I could determine the outcome of her condition.

Q. What did you do after that?

A. I went to the Chevrolet Garage to see if I could get a wrecker.

Q. Had you come across Mr. Bunderson, the Sheriff? A. No sir.

(Testimony of Rulon D. Hair.)

Q. Did you get a wrecker?

A. The Chevrolet Garage didn't have one available so I went to the Ford Garage.

Q. What did you do then?

A. I got a wrecker.

Q. And then what did you do?

A. I rode out to the scene of the accident.

Q. Who was with you?

A. Myself and the wrecker man.

Q. When you got to the scene of the accident was anyone there?

A. Several people there.

Q. Who were they?

A. The Sheriff was the only one I knew.

Q. What did you do?

A. We completed getting the tobacco back in the truck and the door was wired shut and the wrecker brought it in to town.

Q. While you were there did you see Mr. Bunderson?

A. Yes sir. [342]

Q. Did he ask you or did you tell him what caused the accident?

A. I don't recall that, I don't recall that I told him there, but I did tell him about the accident.

Q. At the scene of the accident?

A. I don't remember whether I told him there or not.

Q. Did you notice the tires on your truck after the accident?

A. Yes sir, I checked them.

Q. Was anything wrong with any of them?

A. The right front tire had a large split in it, a blow-out.

(Testimony of Rulon D. Hair.)

Q. That was at the scene of the accident?

A. I didn't notice it until we got to the garage.

Q. You noticed it at the garage.

A. Yes sir, but I noticed a flat tire at the scene of the accident.

Q. Did you answer any questions that Mr. Bunderson asked you out there?

A. If he asked me any I answered him.

Q. Where did you put this truck when you got back to Montpelier?

A. It was taken to the Ford Garage. It was towed in.

Q. What else did you do about inquiring about Mrs. Newby?

A. I called on the phone after I got back. I don't recall whether it was in the garage or after I went to the Police station to file the accident report.

Q. Did you hear from *then*, or her anything?

[343]

A. I don't think I did.

Q. Did you hear anything about her that night?

A. I don't think I did.

Q. Did you do anything the next morning about inquiring about Mrs. Newby?

A. I called the first thing in the morning.

Q. Did you have a discussion with Mr. Bunderson, the Sheriff the next morning? That is, about the accident?

A. Yes sir.

Q. Did you talk to him the night of the accident?

A. Yes sir.

Q. Where was that conversation?

(Testimony of Rulon D. Hair.)

A. In the Police station at Montpelier.

Q. Who else was there?

A. I think the Chief of Police and one of the officers in town.

Q. At that time did he ask you or did you tell him how the accident happened?      A. Yes sir.

Q. Do you remember what you told him as to how the accident happened?

A. I told him just how it happened; that I met a semi-trailer.

Q. Is that the time you made some report to the Sheriff in writing about it? [344]

A. I went over to make the report but he didn't seem to have any of these accident report blanks available. That wasn't his office and he didn't have any blanks available so we waited until the next morning.

Q. So it was the morning of the 12th that you saw him again.

A. I wouldn't say it was morning but it was the next day.

Q. Did you furnish him any information or answer the questions that he wanted to know?

A. Yes sir.

Q. Did you sign any paper about how the accident occurred?

A. I signed the accident report.

Q. What did you do with that before you left, did you give it to Mr. Bunderson, or did he take it?

A. Yes sir, he had that.

(Testimony of Rulon D. Hair.)

Q. Did he write anything on that report that you know of?      A. Not that I know of.

Q. Calling your attention to exhibit 8, is any part of that in your hand writing?

A. Yes sir, this section is (indicating).

Q. On which page, the front part?

A. It is number 8.

Q. Is it that part that tells how the accident happened?      A. Yes sir.

Q. Whose writing is the rest of that?

A. It is mine.

Q. That report was in your writing. [345]

A. Yes sir.

Q. You left that with the Sheriff?

A. All except this part here (indicating) is my writing.

Q. Whose is that?

A. I don't know whose it is.

Q. This report was made out where?

A. The Police Station in Montpelier.

Q. Did you go to the Sheriff's office in Paris to make any report?      A. No sir.

Q. You were not there in connection with this case at all?      A. No sir.

Q. Did you do anything about the injury you received in the accident?      A. No sir.

Q. Did you have any Doctor look at it?

A. No sir.

Q. Can you tell the jury what effect the bump you got on the head had on you, if any?



(Testimony of Rulon D. Hair.)

A. I imagine it dazed me; at least I was dazed a little bit after I got out of the truck.

Q. After this accident did you do everything you could for Mrs. Newby to see that she got to the hospital and so on?

A. Everything I possibly could, yes sir.

Mr. Black: I think that is all [346]

Cross Examination

By Mr. Merrill:

Q. Mr. Hair, how long did you live in Pocatello? A. Four and a half years.

Q. Prior to that time where did you live?

A. Salt Lake City, Utah.

Q. And before that,—I will ask you, where were you born? A. Provo, Utah.

Q. How long did you live in Provo?

A. Until 1929.

Q. Your folks live in Provo? A. Yes sir.

Q. When did you commence working for the Reynolds Tobacco Company?

A. In July 1937.

Q. You had understood the instructions of the Company, did you not, with respect to the use of the truck? A. Yes sir.

Q. What were those instructions?

A. Not to carry passengers at any time outside of the Company employes, and to not use the car for personal business whatever.

Q. You had received those instructions?

A. Yes sir.

(Testimony of Rulon D. Hair.)

Q. How were those instructions given to you?

A. In writing and orally, some of them. [347]

Q. I am handing you exhibit marked number 20. Did you receive that bulletin?

Mr. Merrill: Now, I will offer that as a part of this record.

The Court: It may be admitted.

Q. Did you receive that bulletin?

A. Yes, I did.

Q. Did you make a reply to it after you received it?

A. I cannot say for sure, some of these call for a reply and some of them don't.

Q. I hand you defendant's exhibit 23 marked for identification and I will ask you if you ever say that instrument before? A. Yes sir.

Q. Is that in your hand writing?

A. Yes sir.

Q. Does that have anything to do with exhibit 20? A. It is the answer to it.

Mr. Merrill: We offer in evidence exhibits 20 and 23.

Mr. Davis: I don't think we have any objection to these.

The Court: Admitted.

A. Mr. Merrill: I wish to read exhibit 23 to the jury. It is on a letter head of the Reynolds Tobacco Company: "Idaho Falls, Idaho, March 17, 1938. S 22 c c. [348]

In case of an accident I am to fill out accident report in triplicate sending all three copies to my

(Testimony of Rulon D. Hair.)

division manager. Or if it is a serious accident I shall wire you immediately following it up with the regular form.

I will answer every question fully and if the other car is at fault I will endeavor to make settlement on the spot.

I shall never carry any passengers outside of my division manager."

That is signed R. D. Hair, Salesman.

Q. Now, Mr. Hair, I hand you what has been marked as defendant's exhibit 14, and I will ask if that bears your signature? A. Yes sir.

Q. That was the instrument under which you received the car you were using in September 1942?

A. Yes sir.

Q. That instrument is the agreement by you that you will not carry any passengers in that car other than an employe of the company? A. Yes sir.

Q. You thoroughly understood this requirement of you, did you not? A. Yes sir. [349]

Q. On the 10th of September 1942 when you went up to the Areo Club, you of course, knew you were violating the instructions of the Company?

A. Yes sir.

Q. What time did you go up to that Club, strike that,—you knew at that time that if the Company learned of any violation of that instruction that you would be discharged.

Mr. Davis: Objected to as a conclusion.

The Court: Sustained.

(Testimony of Rulon D. Hair.)

Q. What was your understanding would happen if you violated that instruction?

Mr. Davis: Objected to as that calls for his understanding and not for a fact.

The Court: I think the agreement is plain. He has signed it and he testified he understood it.

Q. What time did you meet this lady on the street in Montpelier on the 10th day of September 1942?

Mr. Davis: Objected to as repetition.

The Court: In view of the way this case is being tried I will allow him to answer.

Mr. Davis: And are the defendants permitted to cross examine their witnesses.

The Court: Under the Circumstances I think I will permit it here. Mr. Merrill can crossexamine this witness. [350]

A. It was about six o'clock I should judge.

Q. It was there that she said that she had been up to the Aero Club two nights before?

A. She said a couple of nights before; she could have mentioned two nights before.

Q. Was it then she asked if she could go up with you that night?

A. Yes sir.

Q. What words did she use?

A. I don't know the exact words, but I told her we were going up for dinner and she said "fine, how about going along and having a few dances."

Q. Was anything said about calling you later on the phone?

(Testimony of Rulon D. Hair.)

A. I said I had made arrangements to go for dinner and that I had reports to make.

Q. Did she call you on the phone that day?

A. No sir.

Q. The day before the accident?

A. Oh, yes.

Q. Where did she call you?

A. On the service station phone, they used that for an office.

Q. Who answered it, do you know?

A. No sir, not by name.

Q. Do you recall a boy named Durwood Perkins?

A. Not by name.

Q. Was there a boy that called you? [351]

A. Yes sir.

Q. Then you saw her next coming toward the Burgoyne cabin camp?

A. Yes sir.

Q. That was at the time you were returning from dinner, down town?

A. Yes sir.

Q. Did she get into the car then?

A. No sir, she didn't.

Q. What did you do then?

A. We invited her into the cabin and I introduced her to these other two gentlemen.

Q. How long were you in the cabin?

A. I don't recall.

Q. Was that where she left her hat?

A. Yes sir.

Q. What time did you leave for the Aero Club?

A. 9:30 or 10 o'clock.

Q. That was the night of September 10, 1942?



(Testimony of Rulon D. Hair.)

A. Yes sir.

Q. Thursday night? A. Yes sir.

Q. Then you were with her constantly from that time until the accident at about 4:30 the next day?

A. Yes sir. [352]

Q. Now, during that time that you were with her you were not doing any business for the company? A. None whatever.

Q. That entire time of approximately eighteen hours was a party of your own?

A. Yes sir, it was.

Q. Your trip over to Grace was to tell a Salesman to tell your wife that you would be late getting home that night. A. Yes sir.

Q. And when you left Grace you went back to Montpelier? A. Yes sir.

Q. And it was on the way back you had the accident? A. Yes sir.

Q. Your first object in going back to Montpelier was to take Mrs. Newby home?

A. That would be my first objective I guess.

Q. That is what you intended to do?

A. Yes sir.

Q. Up at the Aero Club the night before, did Mrs. Newby take any drinks?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial and would not tend to prove or disprove any issue in this case.

A. Mr. Merrill: It goes to the type and character of woman it was, and it has another connection in this case as will be developed. [353]

The Court: We will recess for ten minutes.

(Testimony of Rulon D. Hair.)

3:05 P. M., October 22, 1943

The Court: He may answer the last question.

A. Yes sir.

Q. What character of drinks were they?

A. Mixed drinks.

Q. Intoxicating liquor?

A. I guess you would call them that.

Q. How many did she take, if you know?

A. All that I know of is two.

Q. What time did you go up there?

A. I judge around 10:30.

Q. May she have taken some drinks when you were not there?

Mr. Davis: Just a minute, I certainly want to object to that question——

Mr. Merrill: ——with draw it.

Q. Was there a bar at the place?

A. Yes sir, I guess you would say so.

Q. Was she dancing there at the place?

A. Yes sir.

Q. With others as well as yourself?

A. Yes sir.

Q. Intoxicating liquors were sold there at the bar.

A. Yes sir. [354]

Q. You got there about ten-thirty.

A. Yes sir.

Q. Stayed until about two-thirty.

A. Yes sir.

Q. Two-thirty in the morning?

A. Yes sir.

Q. Were there many people there?

(Testimony of Rulon D. Hair.)

A. I don't recall how many people there were, but there were other people here.

Q. The men that went with you left before you did.

A. Yes sir, they went home with someone else.

Q. What time did the place close up?

A. I don't recall what time they closed.

Q. After two or two-thirty you and Mrs. Newby left and came down to Montpelier?

A. Yes sir.

Q. You got down to the intersection of the road leading into Montpelier from the west with the main street of Montpelier?

A. It was across the street from the Burgoyne Cabins which would be in front of the little cafe there across the street from the cabins.

Q. That is when you asked her if she wanted her hat?

A. Yes sir.

Q. Did you know where she lived?

A. No sir. [355]

Q. Did you ask her?

A. I think it was mentioned in front of the pool hall, I don't think she told me.

Q. Did you ask her about taking her home at that time, in front of the cabins?

A. Yes, if I could get her hat and take her home.

Q. What did she say?

A. I don't remember the exact words but she said, "Why go home, let's go to the Oasis and dance some more".

(Testimony of Rulon D. Hair.)

Q. What was that?

A. She said: "Why go home, let's go to the Oasis and dance some more".

Q. What did you say?

A. I said I had to work the next day and I should not go.

Q. What did she say to that?

A. I don't recall.

Q. Well, what did you finally do?

A. I finally consented to go and take her over.

Q. Why did you go over to Soda Springs?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial.

The Court: He may answer as to what he did.

Q. Why did you go to Soda Springs?

The Court: Mr. Davis objected to the question when he went over and the Court sustained [356] the objection. He may state what he did.

A. Went to Soda Springs to see if the Oasis was open.

Q. How far from Soda Springs is Montpelier?

A. About thirty-one miles.

Q. What time did you get to Soda Springs?

A. About four or five o'clock.

Q. You left the Aero Club about two-thirty?

A. Yes, that is as I recall it.

Q. That is about four miles from Montpelier?

A. Six miles, I think.

Q. How long did you remain at the road intersection before you determined to go to Soda Springs?

A. About five or ten minutes.

(Testimony of Rulon D. Hair.)

Q. Then did you stop on the way to Soda Springs?      A. No sir.

Q. Then you arrived in Soda Springs sooner than five or four o'clock?

A. I don't remember what time it was.

Q. How fast did you drive?

A. We were taking our time.

Q. When you got to Soda Springs what did you do?

A. The Oasis Club was closed and I felt too exhausted to drive back so I went to the hotel and rested up.

Q. What Hotel did you go to?

A. The Enders Hotel.

Q. Both of you? [357]      A. Yes sir.

Q. How long did you stay at the hotel?

A. 11 or 12 o'clock.

Q. The next day?      A. Yes sir.

Q. That was September 11, the day of the accident?      A. Yes sir.

Q. You had been at the Enders Hotel from five or six in the morning until eleven o'clock that day?

A. Yes sir.

Q. What did you do?

A. We went to the Oasis cafe and club for lunch.

Q. Did you get lunch?

A. We went in to have lunch and she suggested that we have a drink at the bar so I took her back and had a drink.



(Testimony of Rulon D. Hair.)

Q. How many drinks did she take?

A. One that I know of.

Q. Do you remember any more?

A. No sir.

Q. What did you do then?

A. Danced and played the slot machine and entertained ourselves there.

Q. You took that drink at her suggestion?

A. I wouldn't say that I took it at her suggestion. She suggested a drink and I took one with her.

Q. You remained there until when? [358]

A. It was around about two-thirty.

Q. At that time was anything said about taking her home?

A. I mentioned it several times that I should ought to leave.

Q. What did she say?

A. Let's have another dance and we would get busy and play the slot machines or something. I would mention it again. I mentioned it two or three times during the afternoon.

Q. Did she finally consent to go home?

A. Yes sir.

Q. What did you do?

A. I went outside the Oasis Club and looked up and down the street to see if I could see these salesmen friends of mine so I could notify my wife that I would be later than usual in getting home.

Q. What did you do then?

A. Drove to Grace for the same purpose.

(Testimony of Rulon D. Hair.)

Q. Did you see him at Grace? A. No sir.

Q. What did you do then?

A. Started to Montpelier.

Q. To take her home?

A. To take her home, yes.

Q. It was on that road that the accident occurred? A. Yes sir. [359]

Q. What was the condition of the weather?

A. Raining.

Q. All day?

A. I don't recall it raining all day. I didn't pay much attention to the weather when we were inside this Club.

Q. What kind of road is it from Soda Springs to the scene of this accident?

A. Oil surfaced road.

Q. Straight or otherwise? A. Both.

Q. Are there cross roads leading from it between these points? A. Yes sir.

Q. How many? A. I don't know.

Q. But you have seen cross-roads leading from this highway between these two points?

A. Yes sir.

Q. What was the character of the roadway as you came to what proved afterward to be the scene of the accident?

A. I don't know just how to answer that.

Q. Was it level or hills?

A. That road all through that section is rolling.

Q. Are there any rises over which you would

(Testimony of Rulon D. Hair.)

come in traveling that road in the immediate vicinity of the accident?

A. Yes sir, several rises.

Q. How close were you to the semi-trailer when you first [360] see it?      A. I cannot say.

Q. Approximately, was it immediately on you or did you see it some distance away?

A. It was some distance away.

Q. Where was it on the highway?

A. To its left of the yellow line, just a little.

Q. How fast was it traveling?

A. I cannot say, I wouldn't know that.

Q. It was when you attempted to pass that semi-trailer that you went off the oiled portion of the road?      A. Yes sir.

Q. What was the condition of the oiled portion of the road at that time?

A. It was still raining.

Q. What was the condition of the shoulder on the west?      A. It was soft.

Q. Was it there that you ran into the shoulder and the soft part?      A. Yes sir.

Q. That is where the blow-out occurred?

A. Yes sir.

Q. What did you do after the blow-out?

A. I tried to control it, tried to keep it from going off the embankment.

Q. Was there any comment made of your driving at that time? [361]      A. No sir.

Q. Or as to the manner in which the car was being operated?      A. No sir.

(Testimony of Rulon D. Hair.)

Q. At any time? A. No sir.

Q. I think you said that after the accident a passing motorist came along and helped you. How long was it after the accident that this passing motorist came?

A. I don't know. I know I had quite a time getting out of the car, the door was jammed a little, and then of course, I was upside down and I couldn't say how long it was.

Q. Would it be a few minutes or a half an hour?

A. Five or ten minutes, it would not be half an hour.

Q. What did the passing motorist do?

A. He came over to the truck to see if there was anything he could do to help.

Q. When did the horn catch?

A. After I rolled over was the first I noticed.

Q. Did you know the driver of the semi-trailer?

A. No sir.

Q. Did you see the license plates on it?

A. No sir.

Q. Did you know whose trailer truck it was?

A. No sir.

Q. Had you seen it before?

A. Never seen that particular one that I know of. I have [362] seen lots like it.

Q. After you came to Montpelier you went to the garage to get a wrecker to go out?

A. Yes sir.

Q. Did you go out with the wrecker?

A. Yes sir.

(Testimony of Rulon D. Hair.)

Q. Who was the driver of the wrecker?

A. I don't know the name.

Q. Was it Oxenbine?

A. I don't think I had occasion to ever hear it.

Q. How long were you out there?

A. I don't know for sure.

Q. Was the truck turned right side up by the wrecker?

A. I don't recall.

Q. How was it brought in to Montpelier?

A. By the wrecker.

Q. Were the front wheels lifted up or were they left on the ground?

A. Lifted up.

Q. Then it was brought in with the front wheels lifted up?

A. Yes sir.

Q. You noticed the blow-out or flat on the scene of the accident?

A. I didn't notice the blow-out but I noticed that the tire was flat.

Q. When you got to Montpelier did you examine the tire?

A. Yes sir. [363]

Q. What did you find to be the fact?

A. It was blown out, split, and cut through.

Q. You spoke of some tobacco, whose tobacco was that?

A. Well, it belonged to the Rino Wholesale Company until it was sold.

Q. You had gotten it from his place?

A. Yes sir.

Q. And was selling it for him?

A. Yes sir.

Mr. Merrill: That is all.



(Testimony of Rulon D. Hair.)

Cross Examination

By Mr. Davis:

Q. About how much did Mrs. Newby weigh, was she a small or large woman? A. Quite small.

Q. Were you afraid of her?

Mr. Merrill: Objected to as calling for a conclusion of the witness.

The Court: He may answer.

A. No sir, I wasn't.

Q. Who bought her the drinks, these two drinks she took at the Aero Club?

A. The two I know of, I bought.

Q. Who did the Camel Cigarettes that were in that truck belong to?

A. The entire amount of tobacco that was in the truck, I [364] got from the Rino Wholesale Candy Company.

Q. Who did it belong to?

A. To the Rino Wholesale Candy Company, until I paid him.

Q. You were not working for the Rino Wholesale Company? A. No.

Q. Then was this a part of your job, your company permitted you to haul that tobacco in this way? A. Yes sir.

Q. You were not hauling that contrary to the instructions of the Reynolds Tobacco Company?

A. No sir.

Q. You hauled it that way all of the time?

A. Yes sir.

(Testimony of Rulon D. Hair.)

Q. It was part of your job to haul tobacco for the jobber and deal with them? A. Yes sir.

Q. The Rino Candy Company is a jobber of the Reynolds Tobacco Company? A. Yes sir.

Q. Did you haul tobacco before for the Rino Candy Company?

Mr. Merrill: Object to what he did before.

The Court: He may answer.

A. Yes sir.

Q. And you were paid for that by your Company? A. Yes sir. [365]

Q. Now this trailer that you saw, you don't remember how far away it was from you when you first saw it? A. No sir.

Q. Was it soft that day on the shoulder of the road?

A. Yes, it was, I found that out afterward.

Q. And you found out that along all these side roads it would be quite soft?

A. I didn't find that out.

Q. Wouldn't these side roads be soft too?

Mr. Merrill: Objected to as incompetent, irrelevant and immaterial. These roads may have been graveled.

The Court: He may answer that if he knows.

A. I wouldn't know.

Q. Did you make any investigation to see if the truck had taken off on any side road?

A. No sir.

Q. Did you ask the Sheriff to make any investigation? A. No sir.

(Testimony of Rulon D. Hair.)

Q. Did you make any effort to find out the name of the driver, or who he was? A. No sir.

Q. That was a very large truck?

A. Yes sir.

Q. What kind of split was this on the tire?

[366]

A. An open cut on the tire.

Q. How long a cut? A. I don't recall.

Q. Was it two inches long?

A. I think it was longer than that.

Q. Was it three inches? A. I couldn't say.

Q. How pronounced a cut, how deep?

A. It was blown out in the center of the tire, two and a half or three inches wide.

Q. Was the rest of the tire in good shape?

A. Yes sir.

Q. Is this a rim center, or drop center tire,—strike that—Do you know what kind of tire that is?

A. A six hundred by sixteen.

Q. What is known as a balloon tire?

A. Yes sir.

Q. You don't know whether it was what is called a drop center or rim center?

A. No sir.

Q. You have driven trucks, done a lot of driving? A. Yes sir.

Q. This truck was more difficult to drive than a passenger car? A. Yes sir.

Q. You consider yourself a good driver? [367]

A. Yes sir.

(Testimony of Rulon D. Hair.)

Q. Had you ever violated this Company's instruction from the time you violated them in April 1939 until you took Mrs. Newby up to the Aero Club?

A. Yes sir.

Q. Where did you violate them?

A. One time in Clark County, in fact there were two times in Clark County, and at Montpelier on that occasion. You said after April 15th. Probably two or three other times that I don't recall. However, that wasn't in Clark County.

Q. You violated them twice in Clark County, twice in Montpelier and two or three other times, you don't recall.

A. Four or five times.

Q. You violated them with reference to hauling guests in the car?

A. Yes sir.

Q. Did you haul a woman guest in your car in Clark County?

A. Yes sir, that one time.

Q. Did you haul one there more than once?

A. My wife another time.

Q. That is the only two times that you violated them in Clark County?

A. That is all that I recall.

Q. You might have done so at other times that you don't recall? [368]

A. I wouldn't say for sure. I had my wife two or three different times. When I make the trip over to Pond's Lodge I would take her with me.

Q. That was after you and Mr. Donnelly had talked and Mr. Darr had taken you back and you were not going to violate the instructions any more?

A. That's right.

(Testimony of Rulon D. Hair.)

Q. You say that the back end of the car was quite heavy?      A. Yes sir.

Q. A good deal more weight on the back than the front?      A. Yes sir.

Q. Was it enough so that the front end tipped up?      A. A little bit.

Q. As you drove along the front end tipped up?

A. It would make it a little lighter on the front.

Q. When it's raining you drive more carefully?

A. Yes sir.

Q. Did you see this tire taken off of the car, the one that was blown out?      A. No sir.

Q. You don't know what the condition of the tube on the inside was?      A. No sir.

Q. Calling your attention to Plaintiff's exhibit number 12, is that in your hand writing, the portions that are not printed? [369]      A. Yes sir.

Q. Is that the form that you made out after this accident when Mrs. Newby lost her life?

A. At that time she had not lost her life, no.

Q. I mean the accident,—this is the report you made out after the accident?      A. Yes sir.

Q. What did you do with that report?

A. Mailed it to the Company?

A. I call your attention to the answer to question 15, the question "Was driver on own business or that of owner?" The answer is "owner"; is that in your hand writing?      A. Yes sir.

Mr. Merrill: Objected to as calling for a conclusion.



(Testimony of Rulon D. Hair.)

The Court: The answer may stand.

Q. Now will you look at exhibit 13, is that exhibit in your hand writing? A. Yes, it is.

Q. Is that the corrected exhibit?

A. Yes, this is the corrected exhibit.

Q. The first exhibit was not correct?

A. No, it wasn't, I could explain that.

Q. And you made this to correct it?

A. Yes sir. [370]

Q. Mr. Donnelly was there when you made this exhibit?

A. Yes sir, he was in town, I don't recall whether he was right there.

Q. You showed him the first one and he wanted you to correct it and make another?

A. I didn't show him the first.

Q. How did you happen to make the correction?

A. At the time I made the first one my impression was that Mrs. Newby was going to be all right, so I didn't report her as a passenger in the car, that is the reason I made the report as I did, after I learned that she wasn't improved,—after I found her condition I made this second copy.

Q. The copy you say was corrected?

A. As near as I know it was correct, yes sir.

Mr. Davis: I think that is all.

### Recross Examination

By Mr. Merrill:

Q. With respect to exhibits 12 and 13 in answer to question number 15 "Was the driver on own business of that of owner?" You wrote "owner";

(Testimony of Rulon D. Hair.)

did you mean that you had been doing any business for the owner at the time of the accident?

A. At the time I wrote that I didn't pay any attention, however, I wasn't on business for the owner.

Q. Is that right, Mr. Hair? [371]

A. That is right.

Q. Counsel asked you on cross examination if you had told the Sheriff something about the trailer, now, did you tell the Sheriff about this semi-trailer? A. Yes sir.

Q. What did you tell him?

A. How the accident happened.

Q. Did you make reference to this semi-trailer in telling him? A. Yes sir.

Q. Do you know the report that Mr. Bunderson made?

A. Only what was brought out here in Court.

Q. Did you state the facts as they actually happened, to him? A. Yes sir.

Q. With reference to that accident, in the meeting of the semi-trailer, the running off the road and all?

A. Yes sir, as near as I can remember we went over it thoroughly.

Q. There were four or five times all told between April 15, 1939 and September 11, 1942 when you carried passengers or a passenger.

A. Yes sir.

Q. Did you ever report any such conduct to Mr. Donnelly or the Company?

(Testimony of Rulon D. Hair.)

A. No sir, I didn't.

Q. To your knowledge did they have any information concerning it? [372] A. No sir.

Q. You knew at the time that you had violated their rules? A. Yes sir.

Q. And you made no comment about it?

A. No sir.

Q. Nor said anything about it? A. No sir.

Q. How far is Clark County from Pocatello?

A. A little over a hundred miles to Dubois.

Q. A hundred miles. A. Yes sir.

Q. How far is Pocatello from Salt Lake City, Utah? A. 184 miles.

Q. How large a place is Dubois?

A. Probably a thousand, between five hundred and a thousand.

Q. Did you have any accident of any kind or character between the time of the one in Pocatello in April 1939 and the one in Montpelier, or near Montpelier, in 1942? A. No sir.

Q. That was over a period of three and a half years? A. None at all.

Q. Did you receive any awards for careful driving?

Mr. Davis: That is objected to as being incompetent, irrelevant and immaterial and also self serving.

The Court: I think the Court ruled [373] on this before. I think it is self serving.

Mr. Merrill: He said that he was an experienced driver.

(Testimony of Rulon D. Hair.)

The Court: But that would not prove his experience.

Mr. Merrill: We offer to prove that in January 1940, January 1941 and January 1942 the Reynolds Tobacco Company, based upon this man's experience as a driver, made him an award and wrote him commendatory letters in each of these instances by reason of the fact that he had no accident of any kind or character and that he received an award from a National Society as a result of his care during that period of time.

The Court: The offer is denied.

Mr. Merrill: Exception. That is all of this witness.

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### CARL OXENBINE

being called as a witness on the part of the defendants, after being first duly sworn, testifies as follows:

#### Direct Examination

By Mr. Black:

Q. State your name. A. Carl Oxenbine.

Q. Where do you live?

A. Montpelier, Idaho. [374]

Q. What is your occupation?

A. Mechanic.

Q. How long have you lived there?

A. Thirty-one years.

Q. Where are you working?

A. The Bear Lake Motors.

(Testimony of Carl Oxenbine.)

Q. Is that the Fort Motor Company?

A. They call us the Ford Motor.

Q. Were you working there in September 1942?

A. Yes sir.

Q. Did you have occasion to go with the wrecker out to where a car was off the highway and upside down?

A. I did.

Q. Who went out there with you?

A. Mr. Hair and Cecil Adams and employe of the garage.

Q. When you got out there did you observe the automobile out there?

A. Yes sir.

Q. What did you find with respect to the right front tire?

A. That was blowed out.

Q. How was the car located when you got out there?

A. Upside down facing north.

Q. What was the fact with respect to the tubing in the tire?

A. Well, that was the inner tube,—pieces of it was sticking outside of the casing. [375]

Q. How long a space was it that the inner tube was protruding from the tire?

A. On that type of tire when *the* deflate then there is a space between the tire and the rim, and it was sticking out between the tire and the rim.

Q. Was there a hole in the inner tube?

A. It must have been tore up for the pieces to be sticking out of the tire.

Q. Did you observe the roadway?

A. I noticed the tracks.

Q. What did you observe?



(Testimony of Carl Oxenbine.)

A. I noticed that there were tracks on the right hand side of the road going south and tracks in the mud.

Q. On the oil or the shoulder?

A. Yes sir, on the shoulder.

Q. How deep was it?

A. I would judge that it measured about three and a half or four inches.

Q. How long was it?

A. I imagine from the looks of it that the track was around three or four hundred feet long.

Q. Did that track lead on to the oiled pavement?

A. Yes sir, it cut across the pavement.

Q. Did it lead to where the car was?

A. Yes sir.

Q. What was the character of the roadway off to the west of [376] roadway, that is, west of the oiled pavement, if you noticed it, aside from being muddy?

A. That was more or less of a flat country through there.

Q. What was the character off to the side of the oiled pavement?

A. On the west side?

Q. Yes.

A. That didn't seem as deep, the borrow-pit is on the west side I believe, that was kind of a flat country all through there.

Q. Did you make an examination of the tire to determine what caused the blow-out?

A. I didn't remove the tire, I noticed it as we got ready to pick up the car.

(Testimony of Carl Oxenbine.)

Mr. Black: You may cross examine.

Cross Examination

By Mr. Davis:

Q. For what distance was the road straight on each side of the wreck?

A. I would say a quarter of a mile each way.

Q. That is was absolutely in a straight line?

A. Yes sir.

Q. You have had,—what type of tire was this?

A. That was a 600 by 16, I don't know the make, and how many ply, but it was mounted on a drop center rim.

Q. You have been a mechanic for how long?

[377]

A. I was working out for seven years.

Q. You have had considerable experience with blown out tires and fixing tires and observing them?

A. Some.

Q. In the tracks that you examined there on the road, was there any indication of a cut by the rim?

A. I never noticed it that close.

Q. If the tire was blown out with a truck that heavy would the rim cut the pavement?

A. It would not cut the pavement but it would leave a wider tire mark than in inflated tire.

Q. In your opinion how long would a tire of this type stay on the car, if the tire went down, with the car swerving back and forth?

Mr. Merrill: We object to that as calling for a conclusion and no proper foundation laid.

The Court: I will permit him to answer.

(Testimony of Carl Oxenbine.)

A. Not very long if the car was swerving bad.

Mr. Davis: That is all.

### Redirect Examination

By Mr. Black:

Q. Did you notice whether the right front wheel was bent? A. Yes sir, it was bent.

Mr. Black: That is all.

Mr. Davis: That's all. [378]

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### JACK PERKINS

being called as a witness on the part of the defendant, after being first duly sworn, testifies as follows:

### Direct Examination

By Mr. Merrill:

Q. State your name. A. Jack Perkins.

Q. Where do you live? A. Montpelier.

Q. What is your business or occupation?

A. I operate an apartment house.

Q. What apartment house do you operate?

A. The Downing Apartments.

Q. Were you operating them in September 1942?

A. Yes sir.

Q. For how long prior thereto?

A. About a year and a half before that time.

Q. Did you know Avenell Newby?

A. Yes sir.

Q. Was she living in this apartment house?

A. Yes sir.

(Testimony of Jack Perkins.)

Q. How long had she been there prior to September 11, 1942?      A. I don't know exactly.

Q. Was it a long time or a few months?

A. It was just about a month or somewhere in there. [379]

Q. What is the fact as to whether you served her with notice to vacate?

Mr. Davis: That is objected to as incompetent, irrelevant and immaterial.

The Court: I cannot see the relevancy of it, but you may have some purpose that the Court is not advised of. For the present I will sustain the objection.

Q. What is the fact as to whether you had complaints concerning her conduct, from the other tenants?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial and not proper under any foundation laid, and it is leading.

The Court: It is leading but I will allow him to answer.

A. I did.

Q. What was the character of these complaints.

Mr. Davis: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. State whether or not this complaint or the complaints caused you to serve notice on her to vacate?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial.

(Testimony of Jack Perkins.)

The Court: He may answer.

A. I did. [380]

Q. When was the notice served upon her, to vacate?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. What was the character of this complaint that the other tenants had made to you concerning Mrs. Newby?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial.

The Court: Sustained.

Q. What is the fact, if you know, as to whether or not disturbing parties were had at the apartment of Mrs. Newby during the period of time she was living there?

Mr. Davis: Objected to as incompetent, irrelevant and immaterial and no foundation is laid.

The Court: Foundation is not laid and it would be immaterial. Sustained.

Mr. Merrill: That is all.

Mr. Davis: That is all, I have no examination.

Mr. Merrill: I want to make an offer of proof with this witness.

The Court: You may go ahead with another witness and I will take the offer at the next recess.



L. R. DONNELLY

recalled as a witness on the part of the [381] defendants, having been heretofore duly sworn, testifies as follows:

Direct Examination

By Mr. Smith:

Q. You are the same Mr. Donnelly that testifies before in this case? A. I am.

Q. Just prior to September 11, 1942, what position did you hold with the Reynolds Tobacco Company? A. Division Manager.

Q. Where were your headquarters?

A. Salt Lake City, Utah.

Q. When did you first learn that there had been an accident in the vicinity of Montpelier?

A. I learned it first on the morning of the 11th of September.

Q. What did you do?

A. I immediately got in my car and drove to Montpelier, Idaho.

Q. Where did you first go when you got to Montpelier?

A. I first contacted Mr. Hair who was staying at the Burgoyne cabins, and started an investigation of the accident that he had been in, getting his version, and later I drove the car I was in down to the Fort Garage to look over the wrecked truck. I examined the wrecked truck and after that I went to the Police Station.

Q. At what garage did you examine the wrecked car? [382] A. The Ford Garage.

(Testimony of L. R. Donnelly.)

Q. In Montpelier? A. Yes sir.

Q. State whether or not you made an examination of the tires of the car. A. Yes sir.

Q. What did you find out. Describe what you found?

A. I found that the right front tire had a jagged three cornered cut at the center of the tire, the front tire with a better than six inch tear in the inner tube.

Q. From there where did you go?

A. After making an investigation at the garage I went to the Police Station first of all. I then transferred back to the Garage and went over the car, the wrecked car after getting Mr. Hair's version of the accident. At that time I didn't know there was a passenger in the car. I went to the Burgoyne cabins to make arrangements to stay that evening, and I inquired if Mr. Hair had made out an accident report and he said he had and had mailed it in. While we were at the filling station Mr. Tuesher and Mr. Newby and some other gentleman drove up.

Q. And what did they do?

A. Well, Mr. Tuesher he went over to the car where Mr. Hair was, he was standing along side of the car and he said: "You are not going to leave town", naturally I [383] was interested and I walked over and I heard him make the remark that the "lady that was in your car" then I said: "My God did you have a passenger in your car?" and Mr. Hair admitted it and I asked where the lady

(Testimony of L. R. Donnelly.)

was and he informed me that she was in the Clinic and I asked if I might see the lady, if he would drive me down, me not knowing where the hospital was. He consented to drive me down and I asked for permission to see the lady and found that she was not rational, she wasn't conscious; she was tearing her night gown off; she was out of her head. I came out and I went down the street and I met Mr. Newby and as asked about the condition of his wife and I told him I thought she had a fair chance of recovery. I also told Mr. Newby that I had to leave town and I wanted permission for him to leave town, that we had to take the tobacco back and turn it in and I said I wanted to leave and if it made him feel any better we would go to the Sheriff's office and I would guarantee his appearance at any future date. He accompanied me to the Sheriff's office and we made that arrangement.

Q. That was when you were at the Sheriff's office the second time?      A. Yes sir.

Q. Who was there at that time?

A. The Sheriff was there.

Q. The Sheriff? [384]      A. Mr. Bunderson.

Q. Who else?

A. Mrs. Hair, and his brother-in-law Mr. Tuesher and the Chief of Police and myself.

Q. Relate any conversation that was had, and by whom it was had.

A. I made myself known to the Sheriff; the first time I was there the Sheriff wasn't there, he was out on other business and I made myself acquainted,

(Testimony of L. R. Donnelly.)

I extended my card, and then I inquired,—this was after I got the release of Mr. Hair,—I inquired about his idea of what caused the accident and Mr. Bunderson said he made out a report, and I asked if he visited the scene and he said he had, and I explained to him that Mr. Hair told me how the accident occurred and asked his opinion and he said that he had been at the scene of the accident and that the car evidently had gone down the west side of the road and apparently struck a sharp object which threw the car out of control. I asked if he could have been crowded off the road and he said it was probable or it was possible that he could have been crowded off the road.

Q. Now, back to this first conversation that you had when you got there, when you and Mr. Russell Tuesher and the other Tuesher boy, Calvin,—

A. You mean at the filling station or the police station? [385]

Q. The first conversation that you had.

A. Mr. Newby was present also at the filling station, is that the one?

Q. Yes.

A. And Russell Tuesher?

Q. Did you make the remark—Hair was present at that time?

A. He was at the filling station.

Q. Did you make the remark; “My God did you have another woman again”?

A. I did not

Q. What was it that you actually said?

(Testimony of L. R. Donnelly.)

A. I said: "My God did you have another passenger with you."

Q. You rode down, you said, to the hospital with Mr. Newby and Mr. Tuesher?

A. With Mr. Tuesher and some other gentleman that turned out to be his brother.

Q. Relate any conversation that you had with Mr. Russell Tuesher on the way to the hospital.

A. I inquired, being the first that I found out about a passenger, I made inquiry who the lady was and he informed me it was his sister. Naturally I inquired how the accident happened and what he thought about it and he told me what he knew about the accident and by that time we reached the hospital which wasn't very far.

Q. At that time was anything said concerning the occupation [386] of Mr. Tuesher?

A. Not at that time.

Q. When was that conversation had?

A. After we left the police station we walked up toward the cabin and I asked if he was employed, if he was working.

Q. Was there anything said at that time by Mr. Tuesher concerning the children of Mr. and Mrs. Newby?

A. Yes sir, I naturally inquired, I found out the lady had two children and I asked where the two children were, and he informed me that his sister had been to his house on the 10th and she said that *he* had met a good looking tobacco salesman and that she was going out for a good time, and that



(Testimony of L. R. Donnelly.)

he tried to persuade her not to go, and later on in that evening when his sister had not arrived at home he went over to her apartment or wherever she lived and got her children and took them to his house and put them to bed. He also related that his Mother had quite a lot of trouble with this daughter since she was ten years old that she was a problem girl, and that he loved her very much and was going to stick by her.

Q. Was there, at that time or any other time, anything said relating to litigation?

A. No sir.

Q. Did you at any time tell Mr. Tuesher that Hair didn't [387] have any money?

A. No sir, I didn't.

Q. Did you tell him that the Company would fight any case if litigation was started?

A. I did not. I might add that I am in the sales department and not in the legal department.

Mr. Davis: Move to strike the answer as not responsive.

The Court: Yes, that may be stricken.

Q. Did you make any remark touching upon lawyers at all? A. Not at all.

Q. Now, when you ascertained that Mr. Hair had had a passenger in this automobile what did you do?

A. I told Mr. Hair that he realized he was through as far as the company was concerned.

Q. And what did you do?

A. I discharged him.

(Testimony of L. R. Donnelly.)

Q. What date did you discharge him?

A. It was on the 12th of September.

Q. Was that the date you go to Montpelier?

A. I got up there,—yes it was the date I got there, the accident happened on the 11th and I arrived there on the 12th.

Q. How long was it that you told Mr. Hair that he was discharged and that you were through with him after you found out that he had a passenger in this automobile? [388]

A. Immediately.

Q. Has he worked for you or the Reynolds Tobacco Company since, to your knowledge?

A. He has not worked for us since.

Q. State, if you know, whether Mr. Hair had ever violated the instructions given by both you and the Reynolds Tobacco Company to him, relating the carrying of passengers or guests in the Company truck?

A. No, only once that I testified to that I know of Hair violating instructions, that was in Pocatello.

Q. You heard Mr. Hair testify did you not?

A. Yes sir.

Q. You heard him testify that he violated these instructions as many as four, five or six times?

A. Yes sir.

Q. That was since the accident in Pocatello in 1939?

A. Yes sir, I heard that.

Q. State whether or not it came to your knowledge that he had so carried passengers in the Company truck?

(Testimony of L. R. Donnelly.)

A. It never came to my knowledge.

Q. What would have been the result had any such infraction of the Company rule come to your knowledge?

A. He would have been discharged.

Q. Did any infraction come to your knowledge after April 1939, the one in April 1939 in Pocatello, until the infraction in September 1942?

A. It did not. [389]

Q. Do you have any knowledge,—strike that—I think you stated that Mr. Hair was assigned his territory under you?

A. Yes sir, that is correct.

Q. Where did you have headquarters in that division, as division manager of the Tobacco Company?

A. Salt Lake City, Utah.

Q. State briefly what your duties were as division manager.

A. Supervising salesmen.

Q. Over how much territory?

A. Over Utah, part of Wyoming, almost all of Idaho, that is the extent of it.

Q. How many salesmen were under your supervision?

A. Now or at that time?

Q. At that time.

A. It is a seven man division.

Q. Where did you spend your time with reference to your work?

A. I spent a share of my time with each salesman and also running the Salt Lake City office.

Q. How much time did you allot to Idaho?

(Testimony of L. R. Donnelly.)

A. I endeavored to get around to each salesman once a month. However, sometimes I was not able to do this.

Q. That would be the average?

A. Yes sir.

Q. That would include Mr. Hair? [390]

A. Yes sir.

Q. Where would you generally see Mr. Hair?

A. Wherever he happened to be on the territory, and I was able to get to him.

Q. Where did you generally see him?

A. In all parts of his territory sometime or other. Pocatello was the place I saw him more often because here was his headquarters.

Q. After this accident occurred in Pocatello in April 1939 who was present at the conference you had with Mr. Hair relating to his re-employment?

Mr. Davis: If it has not been asked before I have no objection, but I think it is repetition.

The Court: In the interest of time he may answer.

A. I don't think I understand the question.

Q. You remember the incident of the accident in Pocatello in April 1939? A. Yes sir, I do.

Q. Was there any conference with Mr. Hair shortly after that time relating to his conduct and employment? A. Yes sir.

Q. And what was said at that conversation, and who was present?

Mr. Davis: I think this is repetition. [391]

(Testimony of L. R. Donnelly.)

The Court: Go ahead, but I am sure it is all in the record.

Q. Who was present?

A. Mr. Roe, Mrs. Hair, Mr. Hair and myself.

Q. What was said at that time?

A. We gave him to understand that if he had any passengers including his wife in the Company car, and if he used the car for anything other than Company business he would be discharged.

Mr. Merrill: You may examine.

#### Cross Examination

By Mr. Davis:

Q. You said that you would guarantee Mr. Hair's appearance at any time?

A. I said I would guarantee Mr. Hair's appearance if the Sheriff wished it.

Q. From April 1939 to September 1942 if you found that he had violated the instructions of the Company you would have discharged him?

A. Yes sir.

Q. You had authority to discharge him?

A. That's right.

Q. And employ someone in his place?

A. No sir.

Q. You had authority to discharge him in 1929 when you found he had violated the instructions, but you didn't do it? [392]

A. No sir.

Mr. Davis: That's all.



(Testimony of L. R. Donnelly.)

Redirect Examination

By Mr. Merrill:

Q. What was the reason for not discharging him at that time?

A. After investigating the accident and hearing part of the testimony given at the trial and also the recommendation of the jury and believing that what took place there could happen to anybody in this Court room, that I would give him another chance.

Mr. Merrill: That's all.

Recross Examination

By Mr. Davis:

Q. You didn't mean that the jury recommended that you give him another chance?

A. No sir, I didn't say that.

Mr. Davis: That is all.

Mr. Merrill: That is all.

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JACK PERKINS

being recalled as a witness on the part of the defendants, having heretofore been duly sworn testifies as follows:

Direct Examination

By Mr. Merrill:

Q. You have testified that you had some complaints from other tenants concerning Mrs. Newby?

[393]

A. Yes sir.

(Testimony of Jack Perkins.)

Q. What were those complaints?

A. Noise and disturbances.

Q. From where?           A. From her apartment.

Q. Was there anything said touching parties and visitors?

Mr. Davis: Objected to as being incompetent, irrelevant and immaterial.

The Court: Matters of his own knowledge he could testify to but not what was said in the complaints.

Q. Was it based on this complaint or complaints that you served her with the notice to vacate and move out?           A. Yes sir.

Q. Did she respond to the notice and move out?

A. No sir, the notice was served I think the same day the accident happened.

Q. Was her husband there much of the time?

A. I don't know.

Mr. Merrill: That is all.

#### Cross Examination

By Mr. Davis:

Q. These complaints were about the children, she had three children in the apartment.

A. She had two children.

Q. Was there a complaint that they were running up and [394] *and* down the halls?

A. That is one of the complaints.

Mr. Davis: That is all.

#### Redirect Examination

By Mr. Merrill:

Q. What was the other complaint?

(Testimony of Jack Perkins.)

A. Of noise and disturbance in her apartment.

Q. Had you seen crowds there?

A. No sir.

Q. Were there any complaints touching crowds that went there?           A. No sir.

Mr. Merrill: That is all.

Mr. Davis: Yes, that's all.

Mr. Merrill: We want to offer the deposition of Durwood Perkins, and this testimony was taken pursuant to stipulation of counsel for all parties. I will read the questions and have Mr. Smith read the answers.

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## DURWOOD PERKINS:

### Direct Examination

Q. Will you state your name, please?

A. Durwood Perkins.

Q. And where do you reside, Mr. Perkins?

A. I live at Montpelier, Idaho.

Q. What is your age?

A. Eighteen years. [395]

Q. Will you state whether or not you are subject to call in the military draft?

A. I will leave in the month of August, as near as I can tell now.

Q. During the fore part of September, 1942, would you state where you worked, or by whom you were employed?

A. I was employed by Joseph Burgoyne, and he

(Deposition of Durwood Perkins.)

owned or had leased, a service station and auto court.

Q. Where? A. Montpelier, Idaho.

Q. As an employee of Mr. Burgoyne, would you state briefly your duties in that employment?

A. I came on work at six o'clock in the evening, and I worked from then until closing time. I watched the service station and cabins. I was there alone from nine o'clock in the evening until closing time.

Q. Now, during the fore part of September, 1942, would you state whether or not you knew, or had become acquainted with Rulon D. Hair?

A. Yes, I knew him on sight. I knew he was a Camel cigarette salesman.

Q. Where was he staying at the time you knew him, or became acquainted with him?

A. He was staying at the Burgoyne cottages. That is the auto court I work at.

Q. During the times he was staying at the Burgoyne cottages [396] during the fore part of September, 1942, will you state whether or not you knew of some lady calling him by telephone?

A. Yes, I did. Do you want me to tell about it?

A. No, not until I ask you. Will you now state the approximate time of day that the telephone conversation came in, and who answered the telephone, what was said over the telephone and what you did?

Mr. Davis: Objected to as no foundation is laid for any conversation, and it is not shown that he knew their voices or knew who it was talking.

(Deposition of Durwood Perkins.)

The Court: You may read the answer.

A. Well, the call came between seven and nine o'clock in the evening, and a lady called the service station and asked if I would call Mr. Hair to the phone, and I told her at that time I didn't know any Mr. Hair. She told me it was the Camel cigarette salesman, and asked me if I would call him to the phone, and I said I would, and I asked her if I should say who was calling. She said: "Just say Avenell is calling."

Q. Pursuant to that telephone call what did you do?

A. I went over and told Mr. Hair he was wanted on the telephone.

Q. Was there a telephone in the cottage in which Mr. Hair was staying?      A. No sir.

Q. Where was the telephone? [397]

A. The telephone was in the service station.

Q. With reference to that service station, is that where you stayed the most of the time?

A. Yes, sir, I stayed in the service station until I saw a car drive down to the cottages, then I went down there.

Q. When you told Mr. Hair about this telephone call, what did he do?

A. He came right over to the service station.

Q. And where were you when he came to the service station?

A. Well, I was in there for just the first part of it.

Q. Did he answer the telephone?



(Deposition of Durwood Perkins.)

A. He said——

Q. Just a minute. Did he, or didn't he?

A. Yes sir.

Q. All right. Will you relate what you heard?

Mr. Davis: I object to what he heard as incompetent, irrelevant and immaterial.

The Court: He may answer.

Mr. Smith: You haven't finished the question.

Q. When Mr. Hair answered the telephone will you state whether or not you heard him make any remarks over the telephone? A. I did, yes sir.

Q. Now, will you,—who else was present there besides you and Mr. Hair, if anyone? [398]

A. No one, to my knowledge. Once in a while there are a few people standing around in there, but——

Q. Now, will you state what you heard Mr. Hair say over the telephone?

Mr. Davis: Now, I want to have my same objection to this question, also that it is hearsay.

The Court: He may answer.

A. Answer?

Q. Yes, go ahead.

A. He said,—all I heard him say was, "Hello Avenell, how are you?" That is all I heard him say.

Q. Where did you go,—did you hear any more of the conversation?

A. No, I didn't. I had to leave. I was fixing a tire or something out in the grease room, and I walked out of the station.

(Deposition of Durwood Perkins.)

Q. State if you know the occasion of an accident in which Mr. Hair was involved right about that time, or the next day.

A. I don't understand just what you want.

Q. Well, did you know of an accident in which Mr. Hair was involved?

A. Yes sir.

Q. About that time, or the next day?

A. The next day, yes sir.

Q. The next day did you see Mr. Hair?

A. Yes sir. [399]

Q. Where?

A. He came into the station that evening after the accident. It was between ten and eleven o'clock in the evening.

Q. Between ten and eleven in the evening?

A. It was around there. I didn't pay much attention to the time.

Q. Did he make any remark to you?

A. Yes sir.

Q. When he came into the station between ten and eleven o'clock that evening, did he make any remark to you concerning any telephone calls he might receive?

Mr. Smith: And supplementing the question.

A. And in such remarks did he give you or suggest to you, any directions in case any telephone calls should come in?

Mr. Smith: Now you can answer.

A. Answer?

Q. Yes.

(Deposition of Durwood Perkins.)

Q. Well, he was expecting a phone call from Pocatello,—he come in and told me he was expecting a phone call, and told me to come and tell him, but to be diplomatic about it. That is just what he said.

Q. At that time did you know there had been an accident in which Mr. Hair and Mrs. Avenell Newby were involved?

Mr. Smith: I will withdraw the question because it has already been answered. [400]

Q. When did you first know there had been an accident in which Mr. Hair and Avenell Newby were involved?

A. I did know there had been an accident. Mr. Hair told me himself he had rolled his truck over; I didn't know at the time Avenell Newby was with him, but he told me himself he rolled his truck over.

Q. Is that the only way you knew it, that he told you?      A. That is the only way I knew it.

Q. With reference to this conversation Mr. Hair had with you where he told you he rolled his truck over, was that the day before or the day after the time when he had this telephone conversation where you heard him remark something about, "Avenell is this you"?

A. It was the day after the conversation.

Mr. Merrill: That is all.

Mr. Davis: That is all.

Mr. Black: I think that is all we have.

Mr. Merrill: We rest at this time.

Mr. Davis: We have nothing further except that

there are a couple of matters I want to call to the Court's attention and I want to make a motion.

The Court: I will excuse the jury subject to the call of the Bailiff.

Mr. Davis: Now, if the Court please, in view of the testimony of Mr. Donnelly that he went [401] over the territory, and made the territory of the salesmen once a month; that he went in where the salesmen were. In view of this positive testimony that from April 1939 he had full authority to discharge Mr. Hair for any violation of the instructions of the Company, and because of the local significance attached to the case, and of Donnelly's duty to know of Mr. Hair's actions in the territory, I move that the testimony of Sheriff Close be reinstated and Considered by the jury; that it be considered by the jury for what it is worth.

The Court: The motion will be denied.

Mr. Davis: I want to call the Court's attention to the fact that the Sheriff testified that he was acquainted with Mr. Hair the defendant and that he was the same man as B. R. Hair mentioned in the exhibit.

The Court: That exhibit has been admitted. Counsel for the defendants here admitted, or the defendant admitted that defendant Hair was the same identical person.

Mr. Davis: We rest, we have no rebuttal.

Mr. Merrill: Come now the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, the evidence having been closed and move the Court for [402] a directed verdict, in that it direct the

jury to return a verdict in favor of the said Reynolds Tobacco Company and L. R. Donnelly upon the following grounds to-wit:

That the evidence is wholly insufficient to support any verdict against either of said defendants because said evidence shows without any substantial or any dispute that at the time of the accident and for approximately 18 hours theretofore that the said Rulon D. Hair was not acting as the agent of said defendants or either of them, and was not within the scope of his employment, nor doing anything in the furtherance of his master's business but was entirely upon a pleasure party of his own, and that at the time of said accident he was transporting the deceased Avenell Newby with him and had been during this said 18 hours, from Grace, Idaho, to Montpelier, Idaho, to take her to her home. That the evidence conclusively shows that Avenell Newby was riding in said automobile owned by the R. J. Reynolds Tobacco Company as the guest of Rulon D. Hair, and that said Rulon D. Hair had no authority of any kind or character, from either L. R. Donnelly or the R. J. Reynolds Tobacco Company to haul guests in said car, but had positive written and oral instructions that under no circumstances was he permitted to haul a guest in said car, and that no one should be transported by him other than an employee or officer of the Company, [403] and that this automobile involved in this accident was used without violation of said instructions so far as the company or Donnelly knew, and that there



had been no violation of these instructions in so far as Donnelly or the Company knew at any time since the one incident on the 15th day of April 1939, and that his re-employment at that time was on condition and under the arrangement that he would positively obey such instructions, and that he never thereafter and prior to the 11th day of September 1942 violated such instructions to the knowledge of either of these defendants. That the evidence fails to show that at the time of the accident that Rulon D. Hair was in anywise guilty of violating the guest statute of the State of Idaho, or that he was guilty of reckless disregard of the rights of Avenell Newby, or of any violation of any other of the requirements stated in said statute providing for recovery of the guest suffering damage and that he was not guilty of any negligence at said time and place; that the evidence completely fails to show that the defendant Hair was a careless, reckless and incompetent driver or that he was habitually negligent, and that one accident in Pocatello in 1939 is wholly and completely insufficient, as a matter of law, to establish the status of incompetency on the part of the driver of carelessness or recklessness.

That the incident referred to in plain- [404] tiff's exhibit 22 was unknown to the defendants L. R. Donnelly or the R. J. Reynolds Tobacco Company, or either of them and there is no evidence proving or tending to prove that they had any occasion to know or be informed of said incident, and that the evidence as a whole, in the particulars aforesaid as well as in other particulars fails to show either that

Hair was engaged in the business of these defendants at the time of the said accident or that he was a careless and reckless driver, but that on the contrary, the evidence conclusively shows that he was not engaged, at the time, in furthering the business of said defendants or either of them but was outside the scope of his employment and that the evidence wholly and completely fails to show that he was careless, reckless and incompetent driver, or that the same was known to said defendants or either of them. That in each and all of said particulars the evidence is insufficient to support a verdict against either of said defendants.

Mr. Black: Comes now the defendant Rulon D. Hair and moves the Court that he direct a verdict in favor of this defendant on the following grounds:

That this defendant adopts the motion for a directed verdict heretofore made by counsel for the other defendants as far as it is applicable, and [405] further sets forth the following grounds; That at the time of the said accident and immediately preceding the same the said Avenell Newby was in the company of the said defendant as his guest at her request and her instance and with her acquiescence, and that she joined with him in all acts he performed prior to the accident during this trip and was present during the time just preceding the accident and was in a position to be as observant of all surrounding conditions just preceding the accident and of all acts and omissions on the part of Hair as the defendant Hair was himself; that she was conscious; that she could so observe all of the acts of the defendant

in the operation of the motor vehicle; that she made no protest or objections of any acts of his, regarding the operation of the said automobile, but acquiesced in his conduct and the operation of the automobile as well as other acts or omissions at said time; that she was a gratuitous guest.

That the evidence as a whole is insufficient to sustain the allegation that said Rulon D. Hair had a reckless disregard of the rights of others and of Avenell Newby and so recklessly drove and operated the said Panel truck referred to so that the same ran off the said highway and tipped over, and the evidence is clear that the accident was purely accidental and one [406] caused by the acts of a driver of an on-coming semi-trailer, and the conditions of the weather and the road and the blowing out of a tire, all of which were out of the control of this defendant.

Mr. Merrill: We adopt so much of the motion of counsel as is not included in our own.

The Court: I will take the matter under advisement at this time. I think we will recess until 10 o'clock tomorrow morning. (Admonition to the jury)

10 o'clock A. M. October 23, 1943

The Court: The motion I took under advisement last evening will be overruled.

Mr. Merrill: May we have an exception.

Mr. Black: And we would like an exception.

The Court: Certainly, exception granted.

(Argument of Counsel)

## INSTRUCTIONS OF THE COURT.

The Court: Ladies and Gentlemen of the jury: You have listened intently to the evidence and the argument of counsel in this case, and if I may have your attention for a short time I will advise you as to the principles of law applicable in this matter, by which you must be guided in your deliberations. It [407] is your duty to accept these instructions as correct, and so far as the law in the case is concerned to be guided by the Court's instructions. The law provides an ample and adequate remedy whereby any mistakes in the instructions may be corrected but it is not the province of the jury to undertake to correct the mistakes of law which the Court may make, and for the purpose of your deliberations the instructions must be accepted as the law of the case.

The issues in this case are made up by the complaint of the plaintiffs and the answers of the defendants. These issues have been explained to you quite fully by counsel for the respective parties during the trial and during the arguments made to you, and as you will be permitted to take the pleadings to the jury room with you, I do not think it necessary to say anything further to you in regard to them, except that you may refer to them for any assistance they may be to you during your deliberations. I will also say that you must not consider them as evidence in any sense, they are merely to advise you of the claims made by the respective parties.

In passing upon the issues in this case the burden is upon him who asserts the existence of a fact to



establish it, and in civil actions of this character to establish it by a preponderance of the evidence. The burden therefore is upon the plaintiff in the first instance [408] to show by a preponderance of the evidence the cause of action set forth in his complaint, and in determining the credibility to be given to the testimony of any witness you have the right to take into consideration his interest, if any, in the result of the case, his demeanor on the witness stand, his candor or lack of candor, and all other facts and circumstances which would influence you in determining whether or not a witness had told the truth. Preponderance of the evidence does not necessarily mean the greater number of witnesses. It means the greater weight of the testimony or evidence before you taken as a whole. This is the meaning of preponderance as accepted in the law.

It is your duty, ladies and gentlemen, to follow these instructions in good faith, and to try to apply them to the evidence fairly and impartially, entirely apart from any considerations except the facts in the case, and conscientiously and impartially render a verdict. The fact that one party is a corporation and the other a natural person you must disregard, for both are equal before the law.

You are the sole judges of the facts and you must determine what the facts are from the evidence which has been introduced and from the circumstances which have been introduced and from the circumstances which have been detailed by the witnesses. That being your responsibility, it is also your right and duty to determine and to pass upon [409] the credibility of the witnesses and the weight to be



given to their testimony. You will consider the interest which the witnesses have in the result of the trial, and all other facts and circumstances which in common experience of life you have learned, bear upon human testimony and tend to make it truthful and reliable, or upon the other hand, tend to distort or color it.

You are instructed that the defendants do not appear and defend jointly in this action but that R. J. Reynolds Tobacco Company and L. R. Donnelly defend the action separately by separate counsel. Their respective defenses are alike in some respects but are entirely different in other respects. If you find for the defendant Rulon D. Hair, you cannot under any circumstances find against the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly. On the other hand, if you believe that Hair was a careless, reckless, incompetent driver, and that the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly knew, or by the use of reasonable diligence could have known that he was a careless, reckless and incompetent driver, or, that he was acting as the agent, servant and employee of the R. J. Reynolds Tobacco Company or L. R. Donnelly, within the course and scope of his employment as these terms are defined for you in these instructions, then you would be justified in finding against the defendant R. J. Reynolds Tobacco Company and [410] L. R. Donnelly.

You are instructed that one driving an automobile owned by another is presumed to be the agent of the owner of said automobile.

You are instructed that Section 48-908, Idaho Code Annotated as amended by Chapter 160 of the Idaho Session Law of 1939 provides as follows: "Liability of Motor Owner to Guest. No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his intoxication or his reckless disregard of the rights of others."

In this case it is alleged by the plaintiffs and admitted by the defendants that Avenell Newby was riding in the automobile being driven by Rulon D. Hair as a gratuitous guest and accordingly, the statute quoted to you has full application to the facts in this case.

You are instructed that the plaintiffs have alleged and the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, were negligent in permitting Rulon D. Hair to use said automobile knowing him to be a reckless [411] and incompetent driver. Before you can consider this charge against the said R. J. Reynolds Tobacco Company and L. R. Donnelly, it would be necessary for you to find from a preponderance of the evidence, first; that Rulon D. Hair was a careless, reckless and incompetent driver; and, secondly; that such facts were known to the R. J. Reynolds Tobacco Company and L. R. Donnelly, and before such matter can be considered by you it would be necessary for you to find that

a reasonably prudent man, knowing the facts as shown by the evidence would reasonably conclude that he was of such character. In order that prior specific acts of negligence by a servant, agent or employee should be sufficient to establish the master's negligence in retaining the servant in his employ, the action must be the result of such incompetence of such a character rendering the servant unfit to be retained in his position, and even though you find by a preponderance of the evidence that Rulon D. Hair was a careless, reckless and incompetent driver, yet, if such was not known or by reasonable diligence could have been known to R. J. Reynolds Tobacco Company and L. R. Donnelly, they could not, nor either of them, be held negligent in employing Rulon D. Hair, or keeping him in their employment.

You are instructed, that while some evidence has been admitted as to defendant Rulon D. Hair having permitted other people to ride in his truck at various times, [412] and as to a former accident in which defendant Rulon D. Hair was involved with a similar truck in Pocatello, Idaho, in the Spring of 1939, in which one Myers was involved, and also evidence pertaining to the arrest and plea of guilty of defendant Rulon D. Hair at Dubois, Idaho, in 1939, for an alleged violation of a traffic law, you are instructed that you cannot consider any of said evidence received on either of said incidents as any evidence whatever supporting the charge against defendant Rulon D. Hair, in this action. This evidence was admitted as to defen-

dant R. J. Reynolds Tobacco Company and L. R. Donnelly, as to their responsibility as covered in other instructions.

The Statute of Idaho makes it unlawful for any person to drive any vehicle upon a highway carelessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger **any person or property**, and it is further provided in the State statute that any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other condition then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person, and in that Statute it is provided that it shall be *prima facie* lawful for a [413] driver of a vehicle to drive the same on a highway at a speed not exceeding thirty-five miles an hour, and it is further provided in the State Statute that it shall be *prima facie* unlawful for any person to exceed the speed of thirty-five miles an hour on a highway outside of municipalities.

You are instructed that a servant may be presumed *prima facie* to be acting in the course of his employment, wherever it appears, not only that his master was the owner of the given instrumentality, but also that, at the time when the alleged



injury occurred, it was being used under conditions which normally attended those used in connection with the master's business.

You are instructed that if you should find from the evidence that the said Rulon D. Hair had previously to the 11th day of September 1942, disobeyed the instructions of his employer or employers and had permitted guests to ride with him in the truck or trucks furnished him by the R. J. Reynolds Tobacco Company for the purpose of selling their products and that such fact or facts were known to the R. J. Reynolds Tobacco Company or any of its authorized agents or if by the use of ordinary diligence and precaution such facts could have been known to the said R. J. Reynolds Tobacco Company or any of its agents, then the said defendants in this case could not avail themselves of the defense that [414] the said Rulon D. Hair was acting contrary to instructions and outside the scope of his authority in hauling a guest, or in not attending to company business.

You are instructed that as it is conceded by the R. J. Reynolds Tobacco Company, that the deceased Avenell Newby was riding in the panel truck of said Tobacco Company as a gratuitous passenger or guest of Hair, then the defendants are liable if the accident resulting in the death of Avenell Newby shall have been caused by the operator through his intoxication or his reckless disregard of the rights of others and if you find from a preponderance of the evidence that anyone of these things was the proximate cause of the death of Avenell Newby, then



your verdict should be for the plaintiffs if you find for the plaintiffs upon the other issues.

You are instructed that it has been admitted that L. R. Donnelly was the division manager of the defendant R. J. Reynolds Tobacco Company and that Rulon D. Hair was under the direction and supervision of L. R. Donnelly as division manager, and you are instructed that any notice to L. R. Donnelly or any facts that came to his attention would constitute notice to R. J. Reynolds Tobacco Company, defendant herein, as he was their duly authorized division manager and agent.

Now, if you find in favor of the plain- [415] tiffs and come to consider the damages which you will award there is no precise measure or guide. The question is necessarily committed to the good sense of twelve persons such as you are, acting as jurors. Any damage allowed should be such, as under all the circumstances of the case, will be just. In considering the amount however, you may take into consideration the age and condition of the deceased Avenell Newby. The evidence discloses that she was 28 years of age, and a person of that age, according to the American Experience Table of Mortality, has an expectancy of 36.73 years more of life, assuming she was in good health. You are permitted to take into consideration such loss of companionship and society, if any, which the plaintiffs might have enjoyed. You may also consider such future earnings of the deceased, if any, which might have been received by the plaintiffs. You may also

consider the amount that the plaintiffs have necessarily paid out or incurred by reason of the expense of physicians, hospital and funeral expenses. You are to consider this question as you consider other questions in the case, dispassionately and fairly, with the purpose in good faith to award such reasonable damages as the plaintiffs have suffered. The amount of damages, if any, which you allow shall in no event exceed the amount prayed for in the plaintiffs' complaint.

You are instructed that an employer [416] in selecting an employee, must exercise a degree of care commensurate with the nature and danger of the business in which the employee is engaged.

You are instructed that it is alleged by the plaintiffs that the defendants, Donnelly and Reynolds Tobacco Company intrusted the panel truck to Hair, knowing that Hair was careless, reckless and incompetent, and you are instructed that if you find said allegations to have been proven and if you are satisfied by a preponderance of the evidence that said Rulon D. Hair was a careless, reckless and incompetent driver and that such fact was known by his employer or employers and the owner of said truck, that his employer and the owner of said panel truck would be liable for the acts of said Hair, in reckless disregard of the rights of others, regardless of whether he was acting within the scope of his authority or on his master's or employer's business.

You are instructed that it is conceded that the panel truck belonged to the R. J. Reynolds Tobacco Company and the facts show that the accident oc-

curred during ordinary business hours; that the accident also occurred in the territory or locality in which the said Rulon D. Hair was authorized to operate as a salesman for R. J. Reynolds Tobacco Company products and that the said panel truck [417] belonging to the R. J. Reynolds Tobacco Company and driven by Rulon D. Hair at the time of the accident contained property and products of the R. J. Reynolds Tobacco Company, ordinarily carried for sale by the said Rulon D. Hair in said Panel truck and you are instructed that you may take into consideration these facts and circumstances to assist you in determining whether or not the said Rulon D. Hair was at the time of the accident acting within the scope of his employment.

In this case it is contended that Rulon D. Hair drove and operated the automobile with reckless disregard to the rights of Avenell Newby. The phrase or term, "Reckless disregard" as used in the guest statute quoted to you means an act destitute of heed or concern for consequences; especially foolishly heedless of danger, headlong, rash; without thought or care for consequences.

The depositions read to you in this case are the testimony of witnesses who were unable to attend the trial of this case, and were taken in the manner provided by law and under oath, the testimony of such witnesses as contained in such depositions is entitled to the same consideration and weight as though the witness was present in person and testifying orally in the Court room.

You have already been advised or will [418] observe that this action is one on behalf of George H. Newby, the husband of Avenell Newby, deceased, in his own behalf, and also on behalf of Richard Arlen Newby and Patty Ann Newby, both minors, and children of the deceased, Avenell Newby, who are represented by their guardian ad litem, their father, George H. Newby, and you are instructed that if you find that the plaintiffs are entitled to damages, and if you return a verdict in favor of the plaintiffs, that your verdict should be in a lump sum and that any amount, if allowed, will be apportioned to the father and the minors by the Court in such manner or such amounts as to the Court seems proper.

The instructions you have already heard have been expressed in what may be for the layman rather formal legal language. However, they are not intended to be mysterious. You have the same tools to work with in arriving at your verdict as a Judge of this Court would have if a jury had been waived. Those tools of yours, like his, are your judgment, your memory and recollection, your experience, your common sense and your conscience.

You are not bound by the testimony of any witness as to any matter except as such appeals to your judgment and common sense and you are entitled to view it and to interpret it in the light of your experience, good judgment and common sense. [419]

I think I should tell you also, that you should not single out any particular statement I may have made in giving you these instructions, but they



should be considered as a whole,—as an entire charge.

You have heard the witnesses, seen the exhibits, listened to the arguments of counsel and the instructions of the Court; you may take with you, when you retire, the exhibits which have been admitted and you may refer to them for such assistance as they may give. You should not consider any evidence offered by either side and rejected by the Court, nor should you consider any evidence ordered stricken from the record.

Finally I will say that you are not permitted, in arriving at a verdict, to add together different amounts representing the respective views of the different jurors and then divide the total by twelve or by some other figure intended to represent the number of jurors, or ideas represented. Such would be a quotient verdict and would be contrary to law and contrary to your oath. You are, of course, to give serious consideration to each other's views and reasoning, in an honest endeavor to reach a common agreement, but such agreement is to be based upon the final beliefs of the jurors and must not be arrived at by that mechanical device of addition and division which constitutes a quotient verdict. [420]

In this Court it is necessary that all jurors concur in finding a verdict, even in a civil case of this character. Forms of verdict have been prepared for you and you will have no difficulty in using them. If you find for the plaintiffs and against the defendants Rulon D. Hair; R. J. Reynolds Tobacco Company and L. R. Donnelly you will use the verdict



prepared for that purpose filling in the blank space left in the verdict to indicate the amount of damages you find the plaintiffs are entitled to. If you find for the plaintiffs and against the defendants Rulon D. Hair and L. R. Donnelly, you will use the verdict prepared for that purpose filling in the blank space left in the verdict to indicate the amount of damages you find the plaintiffs are entitled to, in this event, you will also use the verdict in favor of the defendant Reynolds Tobacco Company. If you find for the plaintiffs and against the defendant Rulon D. Hair, you will use the verdict prepared for that purpose filling in the blank space left in the verdict to indicate the amount of damages you find the plaintiffs are entitled to, in this event, you will also use the verdict in favor of the defendants Reynolds Tobacco Company and L. R. Donnelly. If you find for the defendants and against the plaintiffs you will use the verdict prepared for that purpose in which there is no blank space.

When you retire to your jury room you [421] will elect a foreman, when you have arrived at a verdict your foreman alone need sign the same and you will return it into open Court.

The Bailiff will be sworn and you will retire with the Bailiff.

The Court: It will be necessary for you ladies and gentlemen of the jury to retire from the Court room for a few minutes because of legal procedure, and you will be with the Bailiff and you will return with him at the direction of the Court.

Mr. Merrill: Comes now the defendant R. J.

Reynolds Tobacco Company and also defendant L. R. Donnelly, before the jury has retired and objects and excepts to the instructions given to the jury by the Court and also to the failure of the Court to give the requested instructions of the defendants not given by the Court more particularly as follows:

The defendants object to that certain instruction given to the Jury reading as follows: "You are instructed, that while some evidence has been admitted as to the defendant Rulon D. Hair, having permitted other people to ride in his truck at various times, and as to a former accident in which defendant Rulon D. Hair was involved with a similar truck in Pocatello, Idaho, in the Spring of 1939, in which one Myers was involved, and also evidence pertaining to the arrest and plea of guilty of defendant [422] Rulon D. Hair, at Dubois, Idaho, in 1939, for an alleged violation of a traffic law, you are instructed that you cannot consider any of said evidence received on either of said incidents as any evidence whatever supporting the charge against defendant Rulon D. Hair, in this action. This evidence was admitted as to defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, as to their responsibility as covered in other instructions."

The defendants object and except to that certain instruction given to the jury reading as follows: The Statute of Idaho makes it unlawful for any person to drive any vehicle upon a highway care-

lessly and heedlessly in wilful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, and it is further provided in the State Statute that any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other conditions then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person and in that statute it is provided that it shall be *prima facie* lawful for a driver of a vehicle to drive the same on a highway at a speed not exceeding thirty-five miles an hour, and it is further provided in the State Statute that it shall [423] be *prima facie* unlawful for any person to exceed the speed of thirty-five miles an hour on a highway outside of municipalities." This is objected to particularly on the ground this would apply to cases of ordinary negligence in which automobiles are involved and that it does not have application in the instant case, or in any case where the guest statute is involved and that the said instruction would tend to confuse and mislead the jury into considering the law applicable to ordinary negligence rather than cases under the guest statute.

Mr. Black: Defendant Hair excepts to the giving of this instruction on the same grounds.

Mr. Merrill: The said defendant Tobacco Company and Donnelly objects and excepts to the giving of the instruction to the jury reading as follows: "You are instructed that a servant may be presumed prima facie to be acting in the Course of his employment, wherever it appears, not only that his master was the owner of the given instrumentality, but also that, at the time when the alleged injury occurred, it was being used under conditions which normally attended those used in connection with the master's business." Upon the ground that such instruction overlooks the fundamental facts in this case and also overlooks the facts that such presumption may be rebutted by evidence indicating or showing that the servant was using said instrumentality for his own purpose or in a way [424] not within the scope of his employment or in the advancement of his master's business.

Mr. Black: We desire to adopt the same objection to that instruction.

Mr. Merrill: The said defendants further object and except to the giving of the instruction reading as follows: "You are instructed that if you should find from the evidence that the said Rulon D. Hair had previously to the 11th day of September 1942, disobeyed the instructions of his employer or employers and had permitted guests to ride with him in the truck or trucks furnished him by the R. J. Reynolds Tobacco Company for the purpose of selling their products and that such fact or facts were known to the R. J. Reynolds Tobacco Company or any of its authorized agents or if by the



use of ordinary diligence and precaution such facts could have been known to the said R. J. Reynolds Tobacco Company or any of its agents, then the said defendants in this case could not avail themselves of the defense that the said Rulon D. Hair was acting contrary to instructions and outside the scope of his authority in hauling a guest, or in not attending to company business." Upon the ground that the instruction is too limited as to the matter therein involved, particularly in that such could not be the basis of the law in this case unless it [425] should be broad enough to show that the disregard of said instructions of the Company had become *no* notorious as to form a habit, and that an occasional disregard, if any existed, could not be regarded as a waiver of said fundamental rule.

The said defendants object and except to the giving of the instruction reading as follows: "You are instructed that as it is conceded by the R. J. Reynolds Tobacco Company, that the deceased Avenell Newby was riding in the panel truck of said Tobacco Company as a gratuitous passenger or guest of Hair, then the defendants are liable if the accident resulting in the death of Avenell Newby shall have been caused by the operator through his intoxication or his reckless disregard of the rights of others and if you find from a preponderance of the evidence that any one of these things was the proximate cause of the death of Avenell Newby, then your verdict should be for the plaintiffs, if you find for the plaintiffs upon the other issues." Particularly because said instruction does not distinguish



between the rights of the said Hair and the rights of the Reynolds Tobacco Company and Donnelly, but advises the jury in effect that if they should find that Avenell Newby was a guest of Hair's then their verdict should be against the defendants.

Mr. Black: Defendant Hair joins in the objection and exception to that instruction [426]

Mr. Merrill: The said defendants further object and except to the instruction given to the jury and reading as follows: "You are instructed that it has been admitted that L. R. Donnelly was the division manager of the defendant, R. J. Reynolds Tobacco Company, and that Rulon D. Hair was under the direction and supervision of L. R. Donnelly as division manager, and you are instructed that any notice to L. R. Donnelly or any facts that came to his attention would constitute notice to R. J. Reynolds Tobacco Company, defendant herein as he was their duly authorized division manager and agent." Particularly for the reason that there is no evidence showing or tending to show the scope of the authority of said L. R. Donnelly, or that such authority was so broad as to cover matters referred to in said instruction.

Mr. Black: Defendant Hair joins in the objection and exception to that instruction.

Mr. Merrill: The said defendants further object and except to the giving of that portion of the instruction relating to damages reading as follows: "The evidence discloses that she was 28 years of age, and a person of that age, according to the American Experience Table of Mortality, has an expectancy

of 36.73 years more of life, assuming she was in good health." Particularly upon the ground that it is a recitation to the jury of the evidence in the case and not a statement of the law. [427]

The said defendants object and except to the giving of the instruction reading as follows: "You are instructed that it is conceded that the panel truck belonged to the R. J. Reynolds Tobacco Company and the facts show that the accident occurred during ordinary business hours; that the accident also occurred in the territory or locality in which the said Rulon G. Hair was authorized to operate as a salesman for R. J. Reynolds Tobacco Company and driven by Rulon D. Hair at the time of the accident contained property and products of the R. J. Reynolds Tobacco Company, ordinarily carried for sale by the said Rulon D. Hair in said Panel Truck and you are instructed that you may take into consideration these facts and circumstances to assist you in determining whether or not the said Rulon D. Hair was at the time of the accident acting within the scope of his employment." For the reason that the said instruction overlooks the fact and disregards the fact that Hair may have departed from the scope of his employment and engaged in a matter entirely his own and that he was disregarding the instruction of the company in the hauling of guests in said car.

Mr. Merrill: As to the first instruction objected to, regarding the evidence admitted as to the accident in Pocatello in the spring of 1939 and the in-

eident in Dubois, Idaho. The said defendant object to that particularly for the reason that under the facts in this case and [428] the allegations of the complaint, the said defendants R. J. Reynolds Tobacco Company and L. R. Donnelly could not be liable in any respect for either of the acts recited in said instruction and charged to have been committed by the said defendant Hair, and that the same were wholly and completely insufficient to constitute any habit of negligence and particularly that the instruction having to do with the plea of guilty of Hair at Dubois, Idaho in 1939 is improper in that the evidence does not show in any circumstance that the said defendants Tobacco Company and Donnelly had any knowledge or had any reason to know of the said arrest or plea of guilty or any matter connected with the said incident.

The Court: Do you have any exceptions or objections Mr. Davis?

Mr. Davis: None, if the Court Please.

(Whereupon the jury returned to the Court room)

The Court: Ladies and Gentlemen of the jury, you will disregard that portion of the Court instructions where I told you that the evidence discloses that she, meaning Avenell Newby, was 28 years of age, and a person of that age, according to the American Experience Table Of Mortality, has an expectancy of 36.73 years more of life, assuming she was in good health. You will disregard that part of the instructions.

Mr. Merrill: Now, the Defendants [429] R. J.

Reynolds Tobacco Company and L. R. Donnelly, further object and take exceptions to the failure of the Court to give those certain instructions requested by the said defendants, more particularly as follows: Defendants' requested instruction number 5, reading as follows: "You are instructed that a high rate of speed or even excessive speed in the driving of an automobile is not in and of itself reckless disregard of the rights of a guest riding in said car with said driver." For the reason that the rate of speed or even excessive speed in driving an automobile is not in and of itself an element of reckless disregard of the rights of a guest riding in the said car.

Excepts to the failure to give defendants' requested instruction number 6, reading as follows: "You are instructed that if you believe from a preponderance of the evidence that Rulon D. Hair was forbidden by the R. J. Reynolds Tobacco Company to permit anyone to ride in said car as his guest and if you find this instruction was in full force and effect on the 11th day of September, 1942, but that notwithstanding said instruction he hauled Avenell Newby in his car as a guest, you must then find that he was not acting within the scope of his employment and that any injury, if any, that might have occurred to Avenell Newby as said guest, could not have been charged against the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly and no judgment could be rendered against these defendants." [430] For the reason that there was evidence introduced from which the jury could con-



clude that the instruction, from the Company to Rulon D. Hair, not to carry or haul guests in said car was in full force and effect and that a violation thereof would be outside the scope of his employment.

Except to the failure to give defendants' requested instruction number 7 reading as follows: "You are instructed that there is a presumption that the driver of an automobile is the owner's agent, but this presumption is rebuttable. Thus, if you should find in this case, that the said Rulon D. Hair, at the time of the said accident was using an automobile which was owned by R. J. Reynolds Tobacco Company and L. R. Donnelly, but that the use thereof was not in the furtherance of the business of either of said defendants, but was being used by the said Rulon D. Hair for his own personal business or pleasure, then and in that event the said R. J. Reynolds Tobacco Company and the said L. R. Donnelly would not be liable for any damage caused by the use of said automobile by the said Rulon D. Hair." Particularly because there is evidence in the record clearly indicating and tending to prove that the said Rulon D. Hair was not, at the time of said accident, using said automobile in the furtherance of the business of these defendants or either of them, but on his personal pleasure and outside the scope of his employment.

Defendants except to the failure to [431] give defendants' requested instruction number 8, reading as follows: "You are instructed that before the



owner of the automobile or the employer of the driver can be held liable for the actions of the driver you must find that the driver was the agent, servant or employee of said owner or employer and acting at the time of said accident in the furtherance of the said employers business and unless you so find you cannot find against said employer or the owner of said automobile. Even if you should find that at the time of said accident the said Rulon D. Hair was in the employ of the said R. J. Reynolds Tobacco Company or L. R. Donnelly, but that he was using said automobile for his own business or pleasure and not for the furtherance of the business of said company or the said L. R. Donnelly, then, in that event you cannot find against said defendants R. J. Reynolds Tobacco Company or L. R. Donnelly." For the reason that said instruction states the law of the case applicable to the parties involved in this action, and that if the said Hair was using the said car for his own purpose and outside of the scope of his employment, said employers would not be liable.

Defendants further except to the failure of the Court to give requested instruction number 9, reading as follows: "You are further instructed that if you believe from a preponderance of the evidence that on the 11th day of September 1942, Rulon D. Hair was traveling along the [432] highway toward Montpelier, Idaho, with the prime objective of taking Avenell Newby to her home in Montpelier, and that while so driving he was not upon the business of his employer, then and in that event neither

the said R. J. Reynolds Tobacco Company nor L. R. Donnelly can be held liable for any damages that might have occurred on said trip even though the said Hair was driving the truck of the said Reynolds Tobacco Company, which may have contained property belonging to said Tobacco Company." For the reason that the testimony is that the said Hair was at the time of said accident transporting Avenell Newby to her home in Montpelier, Idaho, and that fact, if it be a fact, that said truck contained products of the Reynolds Tobacco Company would not, under the said testimony, render the other testimony as to the use of said car by said Hair for his personal pleasure and business and not within the employment of the Company, valueless, but that said instruction should have been given in the light of the evidence in this case.

Defendants further except to the failure to give requested instruction number 10, reading as follows: "You are further instructed that if you believe from a preponderance of the evidence that the said Rulon D. Hair was transporting Avenell Newby in said truck along said highway at the time of said accident, with the prime objective of taking her to her home in Montpelier, the mere fact that he intended to later pick up his personal effects at the [433] cabin camp could not be considered by you as in any manner engaging in the business of his employer, and if his prime objective was to first take her home, then and in that event it would be a matter of his own personal busi-

ness or pleasure and he could not be held to have been acting within the scope of his employment and his employers could not be held liable." For the same reasons assigned to the failure to give requested instruction number 9.

Defendants except to the failure of the Court to give requested instruction number 12, reading as follows: "You are instructed that if you believe from a preponderance of the evidence that Rulon D. Hair had been drinking intoxicating liquor and that the said Avenell Newby joined with him and also drank intoxicating liquor, and that the two of them were riding in said automobile while under the influence of such intoxicating liquor, then and in that event you are instructed that the said Avenell Newby assumed the risk of any danger or damage that might result from the use of intoxicating liquor and was contributorily negligent in her conduct, and under such circumstances the the plaintiffs cannot recover in this case." For the reason that the law of Idaho is to the effect that if a guest participates and joins with the driver of an automobile in imbibing intoxicating liquor, the guest is equally liable with the driver and is contributorily negligent and assumes the risk of riding in said automobile. [434]

Defendants except to the failure of the Court to give requested instruction number 14, reading as follows: "You are instructed that a gratuitous guest or his heirs or legal representatives cannot recover for a host's negligent operation of an automobile if, conscious of apparent danger or faced

with such conditions and circumstances as would herald danger to a reasonably prudent man, he fails opportunely to protest or acquiesces therein, and in this case, if you believe from the evidence that Avenell Newby, acting as a reasonably prudent person, should have known that Rulon D. Hair was driving said automobile in a reckless disregard of the rights of others, or that he was intoxicated, and nevertheless continued to ride with him under such conditions, or failed to give timely warning to him, then you are instructed that her failure to do so would bar a recovery by the plaintiffs, and if you find such circumstances and facts existed, your verdict should be for the defendants." For the reason that under the law and the facts in this case, if said Avenell Newby failed to protest in anything which said Hair may have been doing in the driving of said automobile but acquiesced therein, she would have assumed all risk and could not recover in this case.

Defendants except to the failure to give defendant's requested instruction number 15 reading as follows: "You are instructed that the plaintiffs have [435] alleged that the defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, were negligent in permitting Rulon D. Hair to use said automobile knowing him to be a reckless and incompetent driver. Before you can consider this charge against the said R. J. Reynolds Tobacco Company and L. R. Donnelly, it would be necessary for you to find from a preponderance of the evidence, first, that Rulon D. Hair was commonly and



ordinarily a careless, reckless and incompetent driver; and, secondly, that such facts were known to the R. J. Reynolds Tobacco Company and L. R. Donnelly. You are further instructed that one incident *or* carelessness or recklessness brought to the attention of R. J. Reynolds Tobacco Company and L. R. Donnelly, does not in and of itself prove that the party so engaged was habitually a careless or reckless driver, but that before such a matter can be considered by you it would be necessary for you to find from a preponderance of the evidence that the said Rulon D. Hair had committed a number of such acts to such an extent that it was a habit with him and that a reasonably prudent man knowing of them and all of them, would reasonably conclude that he was of such character; and unless you find all of these facts to be sustained by a preponderance of the evidence you are instructed to disregard this allegation of the plaintiff's complaint and you cannot consider it in arriving at a verdict." Particularly for the reason that before the theory involved in said instruction and in this case can be [436] made applicable,—strike that—for the reason that one or even two acts of recklessness, carelessness or negligence could not be interpreted as forming a habit *or* negligence and would not render a driver of an automobile as an incompetent driver or habitually reckless and careless.

Defendants except to the failure to give defendants' requested instruction number 16, reading as follows: "You are instructed that ordinary care implies occasional acts of carelessness, for all men



are fallible in this respect, and the law demands only the ordinary. A man perfectly competent in all respects for the duty he undertakes to perform, may occasionally be negligent, so that one or two specific acts of negligence do not prove incompetence. It must either be shown that the so-called negligent acts were the result of incompetence, or were of such character and so constantly committed as to constitute a habit of negligence, rendering the servant unfit to be retained in his position. You cannot find that Rulon D. Hair was incompetent and unfit for the service he was employed to perform with Reynolds Tobacco Company and L. R. Donnelly unless you find from a preponderance of the evidence that his acts of negligence in the operation of an automobile were of such a character and so constantly committed as to constitute a habit of negligence rendering him unfit to be retained in his said employment and, that such a habit of negligence, if such there was, was known to R. J. Reynolds [437] Tobacco Company and L. R. Donnelly. An occasional act of negligence on his part would not constitute a habit of negligence nor render him unfit for the said employment." Particularly for the reason that before the theory involved in this instruction and in this case can be made applicable to the facts herein it would be necessary that the acts asserted to have been committed by the driver be of such character and so constantly committed as to constitute a habit of negligence and that the jury should have been so instructed in this instance.

Defendants except to the failure to give instruc-

tion number 17, reading as follows: "You are further instructed that all of the testimony of Sid Close, Sheriff of Clark County, Idaho, has been, by Order of the Court, stricken from the record, and you are instructed to disregard all of said testimony and give it no consideration in arriving at your verdict." For the reason that said evidence had all been stricken from the record after it had been admitted and that it was prejudicial to the interest of these defendants for the jury not to have been instructed that they should disregard the said testimony of Sid Close, and all of it.

Defendants except to the failure of the Court to give requested instruction number 18, reading as follows: "You are further instructed that one act of negligence if you find that one was committed, by [438] Rulon D. Hair prior to September 11, 1942, and brought to the attention of the R. J. Reynolds Tobacco Company or L. R. Donnelly such fact would be wholly insufficient to charge Hair's said employers or either of them, with negligence, and you must disregard such testimony." Because under the law, it is not possible for the jury to conclude that a driver was incompetent or careless or reckless by reason of having committed one or two previous acts of negligence.

Defendants except to the failure to give their requested instruction number 19, reading as follows: "Even though you find by a preponderance of the evidence that Rulon D. Hair was a careless, reckless and incompetent driver, yet if such was not known to R. J. Reynolds Tobacco Company and L.

R. Donnelly, they could not, nor either of them be held negligent in employing Rulon D. Hair, or keeping him in their employment." For the same reason as assigned to the refusal to give instruction number 18.

Defendants except to the refusal of the Court to give their requested instruction number 21 reading as follows: "You are further instructed that if you should find under a preponderance of the evidence and these instructions that any damages should be awarded against either or any of said defendants, then you are instructed that you should not allow vindictive or punishing damages [439] that are highly speculative, but your award must be based upon actual pecuniary loss measured as nearly as you can in terms of money, that will result to the plaintiffs." For the reason that the jury could not, under the law of this case, consider vindictive or punishing damages that are highly speculative but that they must base any award given upon actual pecuniary loss, and are not to be permitted to allow sympathetic pleas or any attempt to impose punishment upon said defendants or either of them, to enter into the matter.

Defendants except to the failure of the Court to give their requested instruction number 22 reading as follows: "You are instructed that if you should return a verdict for the plaintiffs in this action, the measure of damages will be the pecuniary loss suffered by the plaintiffs as this may be defined to you in other instructions, and you cannot take into consideration any mental or emotional loss or suffering

occasioned by said plaintiffs or any of them by the injury to or death of Avenell Newby." For the same reasons as assigned to the refusal to give instruction number 21.

That for the assigned reasons and for various other reasons having application to this case the instructions given and objected to herein did not state the law covering the trial, and controlling in this case, but tended to confuse and mislead the jury, and [440] that the requested instructions which were not given, state the law applicable to the facts of this case and were necessary for the protection of the rights of these defendants.

The Court: Now, the Bailiffs will be sworn and the jury will retire to consider this matter.

(Verdict in favor of plaintiffs and against defendants in the sum of \$7500.00 returned by Jury.)

Mr. Smith: Defendants R. J. Reynolds Tobacco Company and L. R. Donnelly wish to formally except to the verdict of the jury.

Mr. Black: And the same exception is taken for the defendant Hair. [441]

State of Idaho,  
County of Ada—ss.

I G. C. Vaughan hereby certify that I am the reporter who took the testimony and proceedings in the above entitled case in shorthand, and I further certify that I thereafter transcribed the same into longhand and compiled the same in the form of a transcript, and that the foregoing 344 pages, ex-



clusive of this certificate is a true and correct transcript of the testimony given and the proceedings had in and about the trial of the said cause.

In witness whereof I have hereunto set my hand this 9th day of March 1944.

G. C. VAUGHN

[Endorsed]: Filed Mar. 10, 1944. [442]

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[Title of Court and Cause.]

STIPULATION AND ORDER TO TRANSMIT  
EXHIBITS

It Is Hereby Stipulated and Agreed that, good cause existing therefor, the following exhibits may be forwarded by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, in lieu of copies thereof and in lieu of having the same printed in the record, the remaining exhibits having been designated in the contents of the record for printing, excepting Exhibit No. 1 which was not introduced, and which exhibits thus stipulated to be transmitted are of such character as to be difficult to print and can best be considered by the appellate court in their original form, being numbered and described as follows:

No. 2. Photograph

No. 3. Drawing or map

No. 4. Photograph

No. 5. Photograph



- No. 6. Photograph
- No. 7. Business card
- No. 8. Report of L. R. Donnelly
- No. 9. Report of Bunderson [452]
- No. 10. Photograph of deceased in frame
- No. 12. Report of R. D. Hair
- No. 13. Corrected report of R. D. Hair
- No. 15. Motor registration receipt, 1939
- No. 16. Motor registration receipt, 1940
- No. 17. Motor registration receipt, 1941
- No. 18. Motor registration receipt, 1942

Dated this 22nd day of January, 1944.

GLENN A. COUGHLIN

Residing at Montpelier, Idaho

B. W. DAVIS

Residing at Pocatello, Idaho

Attorneys for plaintiffs and  
appellees

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for R. J. Reynolds  
Tobacco Company and L. R.  
Donnelly

ROY L. BLACK

JOHN R. BLACK

Residing at Pocatello, Idaho

Attorneys for Rulon D. Hair

ORDER

It appearing to the Court that the above named defendants by separate appeals have appealed to the United States Circuit Court of Appeals for the Ninth Circuit, and it further appear- [453] ing that there are certain exhibits which would be difficult to print or to make copies thereof and can best be presented to the appellate court in their original form; and said parties having stipulated in the premises,

It Is Hereby Ordered that the foregoing stipulation is hereby approved, and pursuant thereto,

It Is Further Ordered, and this does order, that the exhibits described in said stipulation and hereby referred to for further particulars shall be forwarded by the Clerk of this Court to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, to be by such Court held for inspection and used on appeal so taken by said appellants.

Dated January 24th, 1944.

CHASE A. CLARK

District Judge

[Endorsed]: Filed Jan. 24, 1944. [454]

[Title of Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL BY R. J. REYNOLDS TO-  
BACCO COMPANY AND L. R. DONNELLY

Come Now the appellants, R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the above named defendants, and hereby designate the contents of the record, proceedings and evidence to be contained in the record on appeal of the above entitled cause to the Circuit Court of Appeals for the Ninth Circuit, as follows:

1. Complaint.
2. Petition for order appointing guardian ad litem.
3. Order appointing guardian ad litem.
4. Order for removal to the United States District Court for the District of Idaho, Eastern Division.
5. Motion to dismiss and to make more definite and certain, by R. J. Reynolds Tobacco Company and L. R. Donnelly.
6. Motion to dismiss and to make more definite and certain by Rulon D. Hair.
7. Order on motions.
8. Demand for jury trial.
9. Answer of R. J. Reynolds Tobacco Company and L. R. Donnelly.
10. Answer of Rulon D. Hair.
11. Motion to file amended complaint.
12. Objections to filing amended complaint by R. J. Reynolds Tobacco Company and L. R. Donnelly.

13. Objections to filing amended complaint by Rulon D. Hair.

14. Minute entry granting plaintiff permission to file amended complaint.

15. Amended Complaint.

16. Motion to dismiss, motion for more definite statement, and motion to strike, directed to amended complaint, by R. J. Reynolds Tobacco Company and L. R. Donnelly.

17. Motion to dismiss, motion for more definite statement, directed to amended complaint, filed by Rulon D. Hair.

18. Order re motion to dismiss, etc. of R. J. Reynolds Tobacco Company and L. R. Donnelly.

19. Order re motion to dismiss, etc. of Rulon D. Hair.

20. Answer of R. J. Reynolds Tobacco Company and L. R. Donnelly to amended complaint.

21. Answer of defendant Rulon D. Hair to amended complaint.

22. Motion to require plaintiffs to elect, and to strike, filed by R. J. Reynolds Tobacco Company and L. R. Donnelly.

23. Motion to require plaintiffs to elect, and to strike, filed by Rulon D. Hair.

24. Minute entry denying defendants' motions requiring plaintiffs to elect.

25. Minute entry denying motions for instructed verdict and exceptions to instructions to jury.

26. Verdict of jury.

27. Judgment on Verdict.

28. Petition on motion for judgment notwithstanding verdict and, in the alternative for a new trial, filed by R. J. Reynolds Tobacco Company and L. R. Donnelly.

29. Petition of Rulon D. Hair on motion for judgment notwithstanding verdict and, in the alternative, for a new trial.

30. Minute entry denying motions.

31. Notice of appeal filed by R. J. Reynolds Tobacco Company and L. R. Donnelly.

32. Cost Bond on appeal of R. J. Reynolds Tobacco Company and L. R. Donnelly.

33. Petition for approval of supersedeas and stay on appeal. [456]

34. Order approving bond and granting stay of execution against R. J. Reynolds Tobacco Company and L. R. Donnelly.

35. All testimony taken at the trial, the same being contained in the reporter's transcript, including all instructions given to the jury and all instructions refused and exceptions taken thereto, two copies of which transcript, including such instructions and exceptions, are herewith filed with the Clerk.

36. The exhibits to be printed in the record, to-wit:

Exhibits numbered:

11—Report of L. R. Donnelly

14—Salesman agreement on delivery of car

19—Salesman agreement on delivery of car

(1942)



20—Letter, Reynolds Tobacco Company to  
salesmen, November 4, 1937 (rejected)

21—Letter, Darr to Hair, June 12, 1940 (re-  
jected)

22—Copy of judgment docket, Probate Court

23—Instructions of R. J. Reynolds Tobacco  
Company and answer of Rulon D. Hair,  
dated March 17, 1938

37. Stipulation re Exhibits.

38. Order re Exhibits.

39. All Court minutes.

40. Two copies of reporter's transcripts.

41. Designation of contents of record on appeal  
by R. J. Reynolds Tobacco Company and L. R.  
Donnelly, and proof of service.

42. Statement of points by R. J. Reynolds To-  
bacco Company and L. R. Donnelly, and proof of  
service.

Dated this 22nd day of January, 1944.

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for R. J. Reynolds  
Tobacco Company and L.  
R. Donnelly [457]

Service of the foregoing Designation of Contents  
of Record on Appeal, by receipt of copy thereof,

admitted to have been made this 22 day of January, 1944.

GLEN A. COUGHLIN

Residing at Montpelier, Idaho

B. W. DAVIS

Residing at Pocatello, Idaho

Attorneys for Plaintiffs and  
Appellees.

ROY L. BLACK

JOHN R. BLACK

Residing at Pocatello, Idaho

Attorneys for Rulon D. Hair

[Endorsed]: Filed January 24, 1944. [458]

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[Title of Court and Cause.]

STATEMENT OF POINTS ON WHICH AP-  
PELLANTS R. J. REYNOLDS TOBACCO  
COMPANY AND L. R. DONNELLY IN-  
TEND TO RELY ON APPEAL

Come Now R. J. Reynolds Tobacco Company and L. R. Donnelly, two of the above named defendants and appellants, and make the following statement of points upon which they intend to rely on the appeal taken by them to the Circuit Court of Appeals for the Ninth Circuit in the above entitled cause:

I.

The trial Court should not have permitted the filing of amended complaint in this cause; the allegations contained therein are insufficient to im-

pose liability upon these appellants, particularly wherein there appears an attempt to charge these appellants with negligence in employing Rulon D. Hair and entrusting him with the automobile referred to in the pleadings; that the amended complaint does not state a claim against these appellants or either of them.

## II.

The trial Court should have required the plaintiffs to elect as between two theories advanced in the amended complaint, that is to say, whether they relied for recovery upon the charge [459] of direct negligence against these appellants, or upon the rule of respondeat superior as applied to Rulon D. Hair.

## III.

There was no negligence on the part of either of these two appellants proximately causing the injury alleged in the amended complaint; further, the defendant, Rulon D. Hair, was not acting as a servant, agent or employee of said appellants, or either of them, nor within the scope of any employment for said appellants, at the time of the accident alleged in the amended complaint.

## IV.

The trial Court should not have permitted introduction at the trial of the cause, various items of evidence appearing in the transcript of the evidence and to which these appellants interposed objections, particularly the testimony of F. H. Smullen, Ben

Buskirk and L. R. Donnelly, relating to the so-called Meyers incident, and the testimony of Sid Close pertaining to the so-called Dubois incident, and plaintiffs' Exhibit No. 22, which purported to be a certified copy of a record of the Probate Court of Clark County, Idaho; that recitation of the foregoing items is not deemed exclusive, in that there are various other claimed errors committed in the admission and rejection of evidence, as disclosed by the record of the testimony in said cause.

#### V.

The evidence introduced at the trial of said cause was wholly insufficient to justify or sustain a verdict against these appellants upon any theory; more particularly, the evidence fails to show these appellants guilty of negligence in employing and continuing in their employment Rulon D. Hair and delivering to him the panel truck referred to in the amended complaint. [460]

#### VI.

The evidence conclusively proves that at the time of the accident alleged in the amended complaint, Rulon D. Hair was not acting within the scope of any employment for and on behalf of these appellants.

#### VII.

The evidence is further insufficient to show that, at the time of said accident, Rulon D. Hair was in anywise guilty of violating the gratuitous guest statute of the State of Idaho, nor that these de-

fendants, or either of them, was in anywise liable for the conduct of Rulon D. Hair.

### VIII.

The trial court should have granted the motion for a directed verdict in favor of these two appellants, upon the grounds made at the close of the evidence and re-stated in their petition on motion for judgment notwithstanding the verdict and, in the alternative, for a new trial, filed in said cause following the verdict of the jury, for the reasons and upon the grounds stated in said petition and motion.

### IX.

There was no waiver on the part of these appellants of their injunction that Rulon D. Hair should not transport a guest in said panel truck.

### X.

Avenell Newby was riding in the panel truck as a gratuitous guest of Rulon D. Hair and not of these appellants, and they, these appellants, are in nowise responsible for the conduct of Rulon D. Hair at the time of said accident; that Avenell Newby participated in all of the acts of Rulon D. Hair and joined with him in each and every act performed prior to the accident, and was in a position to be as observant of surrounding conditions immediately preceding said accident and of [461] all acts of commission or omission on the part of Rulon D. Hair, if any there were, as was Hair himself, and, having thus joined with Hair in said trip



and in the conduct thereof, became barred and estopped, and the plaintiffs and appellees became barred and estopped from claiming damages for any injury that might have been sustained by Avenell Newby as a gratuitous guest of Rulon D. Hair.

### XI.

Avenell Newby assumed any and all risk attendant upon the trip with Rulon D. Hair, and, by reason of the matters and things recited in the testimony, became estopped from claiming damages by reason of anything suffered or permitted at the time and place mentioned in the amended complaint, which estoppel is effective as against the plaintiffs and appellees.

### XII.

There should not have been given to the jury those certain instructions to which objection was made by these appellants at the time said instructions were given, and there should have been given to the jury those requested instructions presented by these appellants and refused by the trial Court.

### XIII.

Generally, there was no negligence on the part of these appellants proximately causing the death of Avenell Newby, these appellants were in nowise liable or responsible at the time and place of said accident for acts of commission or omission, if any there were, by Rulon D. Hair; that at said time and place Rulon D. Hair was not acting within the scope of his employment as an agent, servant or

employee of these appellants, or either of them, and they are in nowise liable under the guest statute of Idaho, or otherwise, to the appellees in this cause; that evidence prejudicial to these appellants [462] was improperly admitted at the trial of said cause and, that the trial Court gave to the jury erroneous instructions and improperly refused to give certain requested instructions; that the verdict against these appellants and the judgment entered thereon are erroneous and in nowise supported by the evidence or the law governing and controlling this action.

Dated January 22, 1944.

E. B. SMITH

Residing at Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residing at Pocatello, Idaho

Attorneys for R. J. Reynolds

Tobacco Company and L. R.

Donnelly

Service of the foregoing Statement of Points by receipt of copy thereof admitted to have been made this 22 day of January, 1944.

GLENN A. COUGHLIN

Residing at Montpelier, Idaho

R. W. DAVIS

Residing at Pocatello, Idaho

Attorneys for plaintiffs and  
appellees

ROY L. BLACK

JOHN R. BLACK

Residing at Pocatello, Idaho

Attorneys for Rulon D. Hair

[Endorsed]: Filed January 24, 1944. [463]

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[Title of Court and Cause.]

ORDER

Good cause appearing therefor,

It Is Ordered That the time for filing and docketing of the transcript on appeal in the United States Circuit Court of Appeals for the Ninth Circuit, in the above entitled cause, be, and the same hereby is, extended to March 25, 1944.

Dated at Boise, Idaho, this 25th day of February, 1944.

CHASE A. CLARK

United States District Judge.

[Endorsed]: Filed Feb. 25, 1944. [464]

[Title of Court and Cause.]

CERTIFICATE OF CLERK OF UNITED  
STATES DISTRICT COURT TO TRAN-  
SCRIPT OF RECORD

United States of America,  
District of Idaho—ss.

I, W. D. McReynolds, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing typewritten pages numbered 1 to 464 inclusive, to be a full, true and correct copy of so much of the record, papers and proceedings in the above entitled cause as are necessary to the hearing of the appeal thereon in the United States Circuit Court of Appeals for the Ninth Circuit, in accord with designation of contents of record on appeal of the appellants, as the same remain on file and of record in the office of the Clerk of said District Court, and that the same constitutes the record on the appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I Further Certify That the fees of the Clerk of this Court for preparing and certifying the foregoing typewritten record amount to the sum of \$54.25, and that the same have been paid in full by the appellants.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court, this 13th day of March, 1944.

[Seal]

W. D. McREYNOLDS  
Clerk. [465]

[Endorsed]: No. 10708. United States Circuit Court of Appeals for the Ninth Circuit. R. J. Reynolds Tobacco Company and L. R. Donnelly, Appellant, vs. George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their Guardian ad Litem, George H. Newby, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Idaho, Eastern Division.

Filed March 15, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.



In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10708

R. J. REYNOLDS TOBACCO COMPANY and  
L. R. DONNELLY,

Appellants,

vs.

GEORGE H. NEWBY, in his own behalf, RICH-  
ARD ARLEN NEWBY and PATTY ANN  
NEWBY, both minors, by their guardian ad  
litem, George H. Newby,

Appellees.

STATEMENT OF POINTS UPON WHICH AP-  
PELLANTS INTEND TO RELY ON AP-  
PEAL, AND DESIGNATION OF RECORD  
NECESSARY FOR CONSIDERATION  
THEREOF

Come Now the appellants and hereby adopt as  
their Statement of Points upon which they intend  
to rely on appeal, the Statement of Points on which  
Appellants R. J. Reynolds Tobacco Company and  
L. R. Donnelly Intend to Rely on Appeal, hereto-  
fore filed with the Clerk of the United States Dis-  
trict Court for the District of Idaho, from which  
Court this appeal is taken, such Statement of  
Points being that appearing in the transcript cer-  
tified to this Court by said Clerk of the United  
States District Court for the District of Idaho.

The appellants hereby designate for printing, as

the parts of record necessary for the consideration of said points, the entire transcript as certified to the Clerk of this Court by the said Clerk of the United States District Court for the District of Idaho, including those exhibits which are enumerated in Paragraph numbered 36 of the Designation of Contents of Record on Appeal; expressly specifying, however, that the exhibits not therein requested to be printed be not printed, being Exhibits numbered 2, 3, 4, 5, 6, 7, 8, 9, 10 12, 13, 15, 16, 17 and 18, referred to in the Stipulation relating thereto filed with said Clerk of the United States District Court for the District of Idaho, and appellants pray that such exhibits be considered in their original form by this Court as a part of the record on such appeal.

E. B. SMITH

Residence and Post Office Address: Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residence and Post Office Address: Pocatello, Idaho  
Attorneys for Appellants.

Service of the foregoing Statement admitted to have been made this 13 day of March, 1944.

GLENN A. COUGHLIN

Residence and Post Office Address: Montpelier, Idaho

B. W. DAVIS

Residence and Post Office Address: Pocatello, Idaho

Attorneys for Appellees.

ROY L. BLACK

Attorney for Rulon D. Hair

P. O. Address and Residence:  
Pocatello, Idaho

[Endorsed]: Filed Mar. 17, 1944. Paul P. O'Brien, Clerk.

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[Title of Circuit Court of Appeals and Cause.]

APPLICATION FOR ORDER DISPENSING  
WITH PRINTING EXHIBITS

To the Honorable Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

The petition of R. J. Reynolds Tobacco Company and L. R. Donnelly respectfully shows:

That an appeal has been perfected by your petitioners to this Court from a judgment rendered in the United States District Court for the District of Idaho, in a suit wherein George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by and through George H. Newby, their guardian ad litem, were plaintiffs, and

R. J. Reynolds Tobacco Company, L. R. Donnelly and Rulon D. Hair were defendants.

There were introduced in evidence at the trial of the cause by the respective parties, the following exhibits, to-wit:

Plaintiffs' Exhibits numbered 3 to 7, inclusive; 10 to 13, inclusive; 15 to 18, inclusive; and 22; also defendants' Exhibits numbered 2, 8, 9, 14, 20 and 22; also Defendants' Exhibits numbered 19 and 21 were offered in evidence and rejected by the trial court.

That Plaintiffs' Exhibits numbered 11 and 22, and Defendants' Exhibits numbered 14, 19, 20, 21 and 23 will be printed in full in the record.

That the exhibits which appellants and appellees believe would be impractical and difficult to print and for which no application to print has been made, are: Plaintiffs' Exhibits numbered 3 to 7, inclusive; 10, 12, 13; and 15 to 18, inclusive; also Defendants' Exhibits numbered 2, 8 and 9, being a map, photographs, and involved printed reports and records, which appellants and appellees believe would be impractical and difficult to print, being referred to in the stipulation by appellants and appellees filed with the Clerk of the United States District Court for the District of Idaho, from which Court said appeal has been taken, such exhibits to be taken and considered as a part of the record on such appeal.

All of said original exhibits have been forwarded by the Clerk of the United States District Court for the District of Idaho to the Clerk of the United

States Circuit Court of Appeals for the Ninth Circuit. There is attached hereto an affidavit of E. B. Smith, which is made a part hereof.

Wherefore, your petitioners pray for an order dispensing with the printing of Plaintiffs' Exhibits numbered 3 to 7, inclusive; 10, 12 and 13; and 15 to 18, inclusive; and Defendants' Exhibits numbered 2, 8 and 9; and that all of the said original exhibits be considered by this Court on such appeal.

**R. J. REYNOLDS COMPANY**  
and **L. R. DONNELLY**

**By E. B. SMITH**

Residence and Post Office Address: Boise, Idaho

**By A. L. MERRILL and**

**R. D. MERRILL**

Residence and Post Office Address: Pocatello, Idaho

Attorneys for Appellants

So ordered,

**CURTIS D. WILBUR**

United States Circuit Judge

---

[Title of Circuit Court of Appeals and Cause.]

**AFFIDAVIT OF E. B. SMITH**

State of Idaho

County of Ada—ss.

E. B. Smith, being first duly sworn, deposes and says:

That he is one of the attorneys for R. J. Reynolds



Tobacco Company and L. R. Donnelly, appellants herein, and makes this affidavit on behalf of said appellants for the purpose of securing an order dispensing with the printing of certain exhibits, all as stated in the Application for Order attached hereto.

That judgment was rendered herein in favor of the plaintiffs and against the defendants on October 23, 1943; that on January 20, 1944, defendants R. J. Reynolds Tobacco Company and L. R. Donnelly perfected an appeal to this Court by filing their Notice and Undertaking on Appeal, and have since served and filed the additional papers required by the rules of this Court.

That on January 24, 1944, the Honorable Chase A. Clark, District Judge, made an order directing that the original exhibits numbered 2 to 10, inclusive, 12, 13, and 15 to 18, inclusive, be forwarded to this Court with the record on appeal, to be used on such appeal, following stipulation of the parties through their respective counsel of record, entered into on January 22, 1944, and duly filed, to the effect that such exhibits are of such character as to be difficult to print and can best be considered by the appellate court in their original form, thus leaving for printing such exhibits as did not offer difficulty in printing; that the exhibits which it is requested be not printed present difficulties in printing and would decidedly encumber the record, as will more particularly appear from an examination of said exhibits, and that such exhibits may probably serve the appellate court better in their original form.

E. B. SMITH

Subscribed and sworn to before me this 13th day of March, 1944.

[Seal]                      WILLIS C. MOFFATT

Notary Public for Idaho, residing at Boise, Idaho.

My Commission expires Jan. 28, 1946.

Copy of foregoing application for order admitted this 13th day of March, 1944.

GLENN A. COUGHLIN

Montpelier, Idaho

B. W. DAVIS

Pocatello, Idaho

Attorneys for Plaintiffs.

ROY L. BLACK

Attorney for Rulon D. Hair

P. O. and Residence: Pocatello, Idaho

[Endorsed]:    Filed Mar. 17, 1944.    Paul P. O'Brien, Clerk.



IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

R. J. REYNOLDS TOBACCO COMPANY  
and L. R. DONNELLY,

*Appellants*

vs.

GEORGE H. NEWBY, in his own behalf,  
RICHARD ARLEN NEWBY and PATTY ANN NEWBY,  
both minors, by their Guardian ad litem, George H. Newby

*Appellees*

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## Brief of Appellants

---

On Appeal from the District Court of the United States for the  
District of Idaho, Eastern Division

---

FILED

E. B. SMITH  
Residence: Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residence: Pocatello, Idaho

*Attorneys for Appellants*

---

PAUL P. O'BRIEN,  
CLERK





No. 10708

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

---

R. J. REYNOLDS TOBACCO COMPANY  
and L. R. DONNELLY,

*Appellants*

VS.

GEORGE H. NEWBY, in his own behalf,  
RICHARD ARLEN NEWBY and PATTY ANN NEWBY,  
both minors, by their Guardian ad litem, George H. Newby

*Appellees*

---

## Brief of Appellants

---

On Appeal from the District Court of the United States for the  
District of Idaho, Eastern Division

---

E. B. SMITH

Residence: Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residence: Pocatello, Idaho

*Attorneys for Appellants*



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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

---

R. J. REYNOLDS TOBACCO COMPANY  
and L. R. DONNELLY,

*Appellants*

VS.

GEORGE H. NEWBY, in his own behalf,  
RICHARD ARLEN NEWBY and PATTY ANN NEWBY,  
both minors, by their Guardian ad litem, George H. Newby  
*Appellees*

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**Brief of Appellants**

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**JURISDICTION**

This action was commenced in the District Court of the Fifth Judicial District of the State of Idaho in and for the County of Bear Lake on September 29, 1942 by the filing of a Complaint by George H. Newby, in his own behalf, Richard Arlen Newby and Patty Ann Newby, both minors, by their Guardian ad Litem, George H. Newby, against R. J. Reynolds Tobacco Company, a corporation organized under the laws of North Carolina, and L. R. Donnelly and Rulon D. Hair, residents and citizens of the State of Utah, to recover \$383.20 special damages, and \$100,000.00 general damages, and costs

of suit for alleged injury to, and death of Avenell Newby, wife of George Newby and mother of the two minors (R.2-7).

October 26, 1942, an Order was made by the State District Court for removal of said cause to the United States District Court for the District of Idaho, Eastern Division (R.10-11), the jurisdiction thereof having been invoked under Section 24 of the Judicial Code as amended, 28 U.S.C.A. Sec. 41. November 12, 1942, appellants filed a motion to dismiss and to make more definite and certain (R.11-12), which motion was denied (R.14-16). Appellants thereupon filed an answer (R.17-22). All parties demanded a jury trial (R.16, 22, 28).

April 5, 1943, appellees filed a motion for an order permitting them to file an amended complaint (R.32). Objections to filing the amended complaint were filed (R.32-34), which were overruled (R.36). An amended complaint was filed February 9, 1943 (R.37-41). Appellants thereupon filed motion to dismiss and for more definite statement, and motion to strike from said amended complaint (R.41-44). July 6, 1943, the trial Court denied the motion to dismiss and for more definite statement, and granted the motion to strike in part (R.46, 47). July 15, 1943, appellants filed an answer to the amended complaint (R.47-54). October 20, 1943, appellants filed a motion to require appellees to elect upon which of the two theories, alleged in the amended complaint, they intended to rely for a verdict, and to strike the allegations of the theory not elected (R.61, 62). October 20, 1943, this motion was denied (R.64).

The cause proceeded to trial before Honorable Chase A. Clark, District Judge, and a jury. October 23, 1943, the jury returned a verdict against appellants and Rulon D. Hair for \$7500.00 (R.68), upon which verdict judgment was entered (R.70). Appellants thereupon filed a petition on motion for judgment notwithstanding verdict and in the alternative, for a new trial (R.71-82), which was denied January 5, 1944 (R.86).

Notice of appeal was filed by appellants on January 20, 1944 (R.87), under Rule 73 and 74 of the Rules of Civil Procedure. The defendant, Hair, did not appeal. Bonds on appeal and for supersedeas were thereupon filed and approved (R.88-93). The record on appeal was certified by the Clerk of the District Court on March 13, 1944 (R. 409). The jurisdiction of this Court is invoked under Section 128 of the Judicial Code as amended, 28 U.S.C.A., Sec. 225 (a).

### **STATEMENT OF THE CASE**

This is an action for damages filed by appellees against appellants and Rulon D. Hair for injuries to, and death of Avenell Newby, wife of George H. Newby and mother of the minors. September 11, 1942, at about 4:30 P. M., Rulon D. Hair was transporting Avenell Newby as a guest in a Chevrolet Panel Truck on U. S. Highway No. 30 North. At a point about 17 miles North of Montpelier, Idaho, the car was upset, Avenell Newby injured, and from such injuries she died on September 16, 1942.

For several years prior to the accident, Rulon D. Hair had been employed by R. J. Reynolds Tobacco Company as a

salesman and used an automobile of R. J. Reynolds Tobacco Company in his operations. L. R. Donnelly was also in the employ of R. J. Reynolds Tobacco Company as District Manager, and had direct supervision over Rulon D. Hair. The panel truck which Hair was then driving, was delivered to Hair under instructions that he was never to use it for transporting a guest. This instruction was oral and also contained in various bulletins (R.311-313), and in the receipt signed by Mr. Hair when he received possession of this panel truck in the following language:

"I further agree that I will not use the car for any other purpose than that of furthering R. J. Reynolds Tobacco Company's business as directed by my Division Manager. I understand that under no consideration am I to permit anyone, save and except an employee of R. J. Reynolds Tobacco Company, to ride with me in said car." (R.206, Def. Exhibit 14).

On September 10, 1942, during the evening and at the solicitation of Avenell Newby (R.314, 355), Rulon D. Hair transported Avenell Newby in this truck from Montpelier, Idaho, to a night club called "Aero Club" east of Montpelier. They remained at that place, where they danced and drank, until about 2:00 or 3:00 o'clock A. M. on the morning of the 11th of September (R.297). They then left the Aero Club, drove back to Montpelier and from there to Soda Springs, Idaho, a distance of about 30 miles, to visit another night club (R.298), arriving at Soda Springs about 4:30 or 5:00 o'clock A. M. (R.299, 319). This club was closed. They thereupon went to Enders Hotel in Soda Springs where they remained until about noon of September 11 (R.320).

They then went to the Oasis Club in Soda Springs, where Mrs. Newby drank intoxicating liquors; they remained there until about 2:30 o'clock P. M. (R.321).

They then drove to Grace, Idaho, where Hair intended to see some salesmen to get them to advise his wife at Pocatello, Idaho, that he would be later than usual in getting home, (R.321); then they started for Montpelier, Idaho, for the purpose of taking Mrs. Newby back to her home (R.321-2).

Mr. Hair and Mrs. Newby were together on a party of their own for a period of about 18 hours, during which time Hair admitted he was doing no business whatever for his employer (R.316). It is undisputed that during that time the two were eating, drinking, dancing, etc. On the way home from Soda Springs to Montpelier on Highway No. 30 North, the car seemingly went out of control and tipped over (R. 302). Mrs. Newby was seriously injured and died a few days later.

Following the death of Avenell Newby, appellees instituted this suit against appellants and Rulon D. Hair, jointly, charging that Hair was in the employ of appellants and, while acting within the scope of his employment, transported Avenell Newby as a guest and while so doing, negligently and recklessly drove said truck so that it was upset upon the highway, causing the injuries heretofore recited, and claimed damages against appellants and Hair (R.2-7).

At the time of the accident, there was and still is in existence in Idaho, Section 48-401 I.C.A., 1932, as amended by Chapter 160 of the Session Laws of 1939, limiting the rights



of a guest against the operator of a motor vehicle for damages, reading as follows:

“48-901. LIABILITY OF MOTOR OWNER TO GUEST. No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his intoxication or his reckless disregard of the rights of others.”

After the case had been removed to the United States District Court, appellees, over the objections of appellants, were permitted to file an amended complaint wherein it was recited that Avenell Newby was riding in the panel truck with Rulon D. Hair as his guest and guest of appellants and, that appellants permitted Hair to use the truck upon the highway knowing that he was a careless, reckless and incompetent driver and in the habit of hauling guests contrary to instructions. Appellants answered the original complaint (R.17-22) ; likewise answered the amended complaint (R.47-54). In their answer to the amended complaint, appellants alleged that Hair had been acting as a salesman for R. J. Reynolds Tobacco Company prior to September 11, 1942, but that he was not in the scope or course of his employment at the time the accident occurred, in that he was entirely on a party of his own and acting contrary to instructions. Appellants denied that Hair was a careless, reckless or incompetent driver of an automobile or that he had hauled guests therein, alleging that if he had hauled such guests, it was without appellants' knowledge or consent. As affirmative defenses, appellants alleged contribu-

tory negligence on the part of Avenell Newby and that she, as a gratuitous guest of Rulon D. Hair, fully and freely acquiesced in everything done by him in the driving of said truck and, therefore, assumed all risks attendant to the trip and, that the injuries which she may have sustained, and damages, if any, thereby suffered by appellees, were the result of matters over which appellants had no control.

Before the trial commenced, appellants moved to compel appellees to elect upon which of the two theories, stated in their amended complaint, appellees would proceed to trial; that is to say, whether they would proceed upon the theory that the defendants were guilty of violating the Idaho Guest Statutes and, therefore, liable for the consequences, or whether they would proceed upon the theory of simple negligence on the part of appellants in permitting Hair to use and operate the panel truck (R. 61-62, 94). The motion was denied (R.64, 95-96). The case proceeded to trial on the issues thus framed and resulted in a verdict and judgment against the appellants and Rulon D. Hair for \$7500.00 and costs (R.68-71).

At the trial, over objections of appellants on grounds of immateriality and in nowise proving or tending to prove the status of Hair as a careless and reckless driver, the Court permitted proof of an accident in which Hair was involved in Pocatello, Idaho, about  $3\frac{1}{2}$  years prior to the accident involved in this case (R.190,200, 222-226, 230-234). The Court also permitted testimony, over the objection of the appellants that same was immaterial and irrelevant, of an arrest during July, 1939, of a man named B. R. Hair, Soda

Springs, Idaho, in Clark County, Idaho, without any showing at all that either of appellants had any knowledge whatever of such occurrence or that it involved Rulon D. Hair (R.214, 286-291); further, over objection of appellants, the Court permitted some testimony that on three or four occasions during approximately four years, Hair had a guest in his car (R.211-213).

At the conclusion of the evidence the appellants moved for a directed verdict on the grounds that the evidence was insufficient; which motion was denied (R.359-362).

After entry of the judgment, appellants moved for judgment notwithstanding the verdict and, in the alternative, for a new trial, (R.71-82), which motion was denied (R.86). Appellants objected to several of the instructions of the Court given to the jury and also to the refusal of the Court to give certain instructions requested by appellants (R.376-394) quoted in the specifications of error.

Appellants' position on this appeal is that they are in nowise liable for the conduct of Rulon D. Hair at, and for a time prior to, the accident involved in this case; that no liability of appellants existed in favor of Avenell Newby or appellees; that the trial Court erred in its rulings touching the pleadings, on various items of evidence in giving and refusing various instructions, its denial of appellants' motions for directed verdict, and for judgment notwithstanding the verdict and, in the alternative, for a new trial, all of which, including the manner in which they were raised, will be more fully explained in the specifications of error and argument to follow.

## QUESTIONS PRESENTED

1. Whether the amended complaint states a claim, and whether the causes of action therein stated can be commingled in the manner attempted, viz., an action for violation of the Idaho Guest Statute, and an action against an employer for simple negligence. The questions are raised by motion to dismiss and elect.

2. Whether or not the Court erred in admitting the evidence produced by appellees, claimed to prove Hair was a reckless and incompetent driver and if so, whether appellants knew this. These questions are raised by objections to the evidence and motions to strike.

3. Whether the evidence as a whole can support the verdict. This question is raised by motion for a directed verdict, and by motion for judgment notwithstanding the verdict.

4. Whether the instructions given by the Court and excepted to by the appellants, were erroneous and, whether the Court erred in refusing to give certain requested instructions, all of which are stated in the specifications of error. These questions arose upon exceptions stated at the time the jury was instructed.

5. Generally, whether under the pleadings and evidence appellants are liable to appellees, grounded upon the insufficiency of the amended complaint to state a claim, and the insufficiency of the evidence to support any verdict or judgment against appellants.

**SPECIFICATIONS OF ERROR****I.**

The trial Court erred in permitting appellees to file their amended complaint in this cause, more particularly because the allegations contained therein charging appellants with negligence in employing Rulon D. Hair and entrusting him with an automobile (Par. VI-VII, R.38-39), are wholly insufficient to place in issue such charge of negligence and is inconsistent with a charge of violation of the Guest Law of Idaho (Appendix No. 1).

**II.**

The Court erred in denying appellants' motion to dismiss the amended complaint upon the grounds that amended complaint failed to state a claim against appellants; and in denying appellants' motion to strike from Paragraph VII of the amended complaint, upon the ground that the same was immaterial, the following:

“Notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instructions,”

(R.41-43, 46-47).

**III.**

The Court erred in denying appellants' motion to compel appellees to elect as between the two theories advanced in the amended complaint (R.61-64), that is to say, whether they



relied for recovery upon the charge of direct negligence against these appellants, or whether they relied upon the theory of respondeat superior under the Guest Law of Idaho.

#### IV.

The Court erred in permitting the witness Smullen to testify concerning an accident in Pocatello, Idaho, April 15, 1939 and to answer the following question: "Was Mr. Hair in, or did he become involved in an accident?" to which objection was made by appellants on the ground that the same was "incompetent, irrelevant and immaterial and not within the pleadings \* \* \* prejudicial \* \* \*," (R.222-223), and in permitting Smullen, over the same objections, to relate the circumstances of said accident (R.222-226).

#### V.

The Court erred in permitting the witness Buskirt to testify to the accident of April 15, 1939 in Pocatello, Idaho, in which Hair was involved, over objection of appellants that the same was "incompetent, irrelevant and immaterial" (R. 231-233).

#### VI.

The Court erred in admitting the testimony of the witness Sid Close as to an incident touching the driving of a motor vehicle in Dubois, Idaho by Rulon D. Hair, over objection of appellants that the same was immaterial in that no knowledge whatever of said incident came to the attention of appellants, L. R. Donnelly and/or R. J. Reynolds Tobacco Company (R.212). First, the Court sustained the objection and ad-

mitted the testimony only as against Hair, which deprived these appellants of the right of cross-examination; the Court then reversed its ruling and admitted said testimony as to appellants (R.286); then the Court again reversed its ruling (R.287), and then admitted in evidence "Plaintiffs' Exhibit 22" over objection of appellants (R. 286-291).

## VII.

The Court erred in admitting in evidence plaintiffs' Exhibit No. 22, (Appendix No. 2), which purported to be a certified copy of the records of the Probate Court of Clark County, Idaho, of a conviction and sentence of *B. R. Hair* of *Soda Springs*, Idaho, on or about July 19, 1939, at Dubois, Idaho, of a misdemeanor, to-wit, driving a motor vehicle on a public highway in a reckless manner, to the offer of which Exhibit, the appellants objected:

\* \* \* \*

"Second: Upon the ground that it is incompetent, irrelevant and immaterial under the issues in this case particularly because there is no proof in the record of any kind or character affecting these two defendants showing or tending to show any act or thing which came to their knowledge, or of which they were acquainted or by reasonable diligence could have been acquainted insofar as this incident is concerned; that it is incompetent, irrelevant and immaterial because there has been no competent testimony adduced in this record insofar as these two defendants are concerned tending to show that they had any knowledge of any kind or character touching anything that Hair may have done in Clark County, and particularly of this incident; there is no testimony in this record

against these defendants which has been connected up that would in any sense bind these two defendants in any of the matters concerned with said exhibit, and lastly, we further object on the ground that this exhibit is incompetent, irrelevant and immaterial under any of the issues in this case as against these defendants and that the same is prejudicial." (R.288-289).

"L. R. Donnelly and the Reynolds Tobacco Company further objects to the introduction of plaintiffs' exhibit 22, upon the ground that it does not purpose to effect or have anything to do with Rulon D. Hair or R. D. Hair living at Pocatello, Idaho, and employee of the defendants at that time, but it recites that it is a person known as B. R. Hair of Soda Springs, Idaho, and could not and does not give any notice to anyone interested in the employee of the defendants, one R. D. Hair of Pocatello, Idaho" (R.291).

### VIII.

The Court erred in overruling appellants' motion to strike certain evidence adduced by appellees, viz.:

1. Plaintiffs' Exhibit No. 22, being a copy of a criminal docket of the Probate Court of Clark County, Idaho (R.287-290), in that such incident was not shown to have been known to appellants or either of them, and could not, on the theory of being a public record, or otherwise, impute knowledge on the part of appellants, or either of them, of any such incident involving Rulon D. Hair (R. 292-293).

2. All evidence relating to the so-called Myers incident alleged to have occurred in Pocatello, Idaho, about April 15, 1939, wherein Rulon D. Hair was involved, and particularly

the testimony of F. H. Smullen, Ben Buskirt, and L. R. Donnelly on cross-examination, so far as it had reference to the Pocatello incident, upon the following grounds:

(a) That an isolated incident even though known was insufficient to prove a habit of negligence on the part of Rulon D. Hair, and wholly insufficient to prove any negligence on the part of appellants or either of them, growing out of their relationship as employer of Hair;

(b) That the single isolated incident of negligence claimed to have been committed by Rulon D. Hair in Pocatello, Idaho, on April 15, 1939, coming to the knowledge of appellants—employer—with no other act of negligence on the part of Hair coming to the attention of the employer, would not render appellants guilty of negligence in retaining Hair in their employ.

#### IX.

The Court erred in requiring the witness L. R. Donnelly, on cross-examination “under the Statute,” to testify concerning the Myers accident and to answer the following question: “Did you find that a person had been killed in that accident?” (R.194) over appellants’ objection as “incompetent, immaterial and irrelevant \* \* \* nothing at all to do with the controversy involved in this case” (R.194), and over the same objections in requiring Donnelly to testify to the details of said accident and the litigation which followed (R. 196-198).

#### X.

The Court erred in requiring the witness E. A. Darr, on cross-examination to testify concerning the Myers accident

and to answer the following question: "You did know, Mr. Darr, that Rulon D. Hair was involved in an accident with R. J. Reynolds Tobacco Company truck on or about April 11, 1939 in which a man, Myers, was killed (R.251) over appellants' objection "that it is incompetent, immaterial and no sufficient foundation laid, and the evidence of one act would not constitute incompetency" (R.251), and in requiring Darr over the same objections to testify to reports received and the details of said accident and the litigation which followed and permitting to be received in evidence and read to the jury over the same objection Exhibits attached to Darr's deposition and designated "B" (R.255-57), "C" (R.258), "D" (R.258), "E" (R.259-60), "F" (R.260-61), "G" (R.261) being letters and reports sent to Darr.

## XI.

The Court erred in admitting in evidence plaintiffs' Exhibit No. 10, being a framed photograph, in color, of the deceased, Avenell Newby, to which appellants objected upon the ground that the same was "immaterial \* \* \* designed to prejudice the jury and no foundation laid for its admission" (R.188).

## XII.

The Court erred in rejecting defendants' Exhibit No. 21 to which objection was made by appellees that the same was self-serving, immaterial, incompetent, and sustained by the Court, which exhibit was offered for the purpose of tending to prove Hair was not a careless and incompetent driver, but on the contrary, the information had by appellants was that he was a very careful driver.



## XIII.

The Court erred in failing to grant appellants' motion for a directed verdict made upon the following grounds:

1. The insufficiency of the evidence to support any verdict against appellants in that the evidence showed without dispute that at the time of the accident and for about 18 hours theretofore, Rulon D. Hair was not acting within the scope of his employment as an agent of appellants or either of them, nor doing anything in the furtherance of his master's business, but was entirely upon a pleasure party of his own and that at the time of the accident, he was transporting Avenell Newby to her home in Montpelier, Idaho.

2. The evidence showed that Avenell Newby was riding in said automobile as a guest of Rulon D. Hair and that Hair had no authority from appellants or either of them to haul guests in said car but had positive written and oral instructions not to haul guests in said car; that neither of the appellants had knowledge of any violations of said instructions as would constitute a waiver thereof.

3. Hair's re-employment from and after April 15, 1939 was on condition that he would positively obey such instructions and there was no knowledge on the part of the appellants thereafter that he ever disobeyed them prior to September 11, 1942.

4. At the time of the accident, Hair was not guilty of reckless disregard of the rights of Avenell Newby nor violating any of the requirements of the Guest Statute of Idaho providing for the recovery of the guest suffering damage.

5. The insufficiency of the evidence to show that Hair was careless, reckless or an incompetent driver or that he was

habitually negligent or if so that said facts were known to the appellants or either of them.

6. The evidence shows that at the time and place of the accident, Avenell Newby was riding in said car at her request and had joined with Hair in all acts he performed prior to and during the time preceding the accident and was in a position to be as observant of all surrounding conditions just preceding the accident and of all acts on the part of Hair, as was Hair himself, and that she made no protest nor objections regarding the operation of said automobile, but acquiesced in Hair's conduct and the operation thereof and thereby assumed all risks attendant upon said trip and the accident resulting therefrom (R.359-363).

#### XIV.

The Court erred in denying appellants' motion for judgment notwithstanding verdict and in the alternative for a new trial, made upon the same grounds as the motion for a directed verdict and the insufficiency of the evidence, errors at law occurring at the trial, including the court's rulings on the evidence heretofore complained of in these specifications, and instructions of the Court given to the jury to which exceptions were taken, and the failure to give other instructions requested by the appellants, all of which are set out in the following specifications of error and appear at length in said motion at (R.71-82).

#### XV.

The evidence is insufficient to justify a verdict and judgment thereon against appellants and is against the law, more particularly as follows:

(a) The evidence fails to show at the time of the accident Rulon D. Hair was acting as an agent, servant or employee of appellants or either of them, but on the contrary, it conclusively shows that he was not acting within the scope of his employment but was engaged entirely with Avenell Newby on a pleasure party of their own.

(b) The evidence is undisputed that at the time of the accident Avenell Newby was a gratuitous guest of Rulon D. Hair being transported by him contrary to positive written or oral instructions from appellants forbidding the hauling of guests and the evidence is insufficient in law to prove a waiver of said instructions.

(c) That the Myers incident and the Dubois incident referred to in the evidence are insufficient as a matter of law to prove Rulon D. Hair as an incompetent or reckless driver and save for the Myers incident, there is no evidence that either of these appellants had any knowledge that Hair had ever been involved in any other accident but, on the contrary, the evidence showed a high degree of competency and skill on the part of Hair in the use of appellants' automobile.

(d) The evidence is conclusive that Avenell Newby was a gratuitous guest of Rulon D. Hair, but fails to show that at the time of the accident Hair was guilty of reckless disregard of her rights or otherwise violated said statute.

(e) The evidence is without dispute that at the time of the accident Avenell Newby was riding with Hair at her request and that the two were engaged in a joint venture in which she assumed all risks incident upon said trip, and that

she was at all times conscious and could observe Hair's conduct, but made no protest but acquiesced therein and she thereby became, and her heirs are now, estopped as a matter of law from asserting liability for damages.

## XVI.

The Court erred in giving to the jury that certain instruction as follows:

"You are instructed, that while some evidence has been admitted as to defendant Rulon D. Hair having permitted other people to ride in his truck at various times, and as to a former accident in which defendant Rulon D. Hair was involved with a similar truck in Pocatello, Idaho, in the Spring of 1939, in which one Myers was involved, and also evidence pertaining to the arrest and plea of guilty of defendant Rulon D. Hair at Dubois, Idaho, in 1939, for an alleged violation of a traffic law, you are instructed that you cannot consider any of said evidence received on either of said incidents as any evidence whatever supporting the charge against defendant Rulon D. Hair, in this action. This evidence was admitted as to defendant R. J. Reynolds Tobacco Company and L. R. Donnelly, as to their responsibility as covered in other instructions," (R.368-369)

to which appellants took exception upon the grounds that neither of appellants could be liable for either of the acts recited in said instruction and in each instance insufficient to constitute any habit of negligence; further, that there was no evidence that either of appellants had any knowledge or information, or could be charged with any, that Rulon D. Hair was involved in the Dubois incident (R.377, 383).

## XVII.

The Court erred in giving to the jury that certain instruction as follows:

“The Statute of Idaho makes it unlawful for any person to drive any vehicle upon a highway carelessly and heedlessly in willful or wanton disregard of the rights or safety of others, or without due caution and circumspection and at a speed or in a manner so as to endanger or be likely to endanger any person or property, and it is further provided in the State statute that any person driving a vehicle on a highway shall drive the same at a careful and prudent speed not greater than is reasonable and proper, having due regard to the traffic, surface and width of the highway and of any other condition then existing, and no person shall drive any vehicle upon a highway at such a speed as to endanger the life, limb or property of any person, and in that Statute it is provided that it shall be prima facie lawful for a driver of a vehicle to drive the same on a highway at a speed not exceeding thirty-five miles an hour, and it is further provided in the State Statute, that it shall be prima facie unlawful for any person to exceed the speed of thirty-five miles an hour on a highway outside of municipalities,” (R.369)

to which instruction appellants excepted upon the ground that “this would apply to cases of ordinary negligence in which automobiles are involved and that it does not have application in the instant case; or in any case where the guest statute is involved and that the said instruction would tend to confuse and mislead the jury into considering the law applicable to ordinary negligence rather than cases under the statute” (R.378).



## XVIII.

The Court erred in giving to the jury that certain instruction as follows:

“You are instructed that a servant may be presumed prima facie to be acting in the course of his employment, wherever it appears, not only that his master was the owner of the given instrumentality, but also that, at the time when the alleged injury occurred, it was being used under conditions which normally attended those used in connection with the master’s business, (R.369-370)

to which exceptions were taken “upon the ground that such instruction overlooks the fundamental facts in this case and also overlooks the facts that such presumption may be rebutted by evidence indicating or showing that the servant was using said instrumentality for his own purpose or in a way not within the scope of his employment or in the advancement of his master’s business” (R.379).

## XIX.

The Court erred in giving to the jury that certain instruction as follows:

“You are instructed that if you should find from the evidence that the said Rulon D. Hair had previously to the 11th day of September 1942, disobeyed the instructions of his employer or employers and had permitted guests to ride with him in the truck or trucks furnished him by the R. J. Reynolds Tobacco Company for the purpose of selling their products and that such fact or facts were known to the R. J. Reynolds Tobacco Company or any of its authorized agents or if by the use of ordinary diligence and precaution such facts could have been known to the said R. J. Reyn-

olds Tobacco Company or any of its agents, then the said defendants in this case could not avail themselves of the defense that the said Rulon D. Hair was acting contrary to instructions and outside the scope of his authority in hauling a guest, or in not attending to company business." (R.370)

to which exceptions were taken "upon the ground that the instruction is too limited as to the matter therein involved, particularly in that such could not be the basis of the law in this case unless it should be broad enough to show that the disregard of said instructions of the Company had become so notorious as to form a habit, and that an occasional disregard, if any existed, could not be regarded as a waiver of said fundamental rule." (R.380).

## XX.

The Court erred in giving to the jury that certain instruction as follows:

"You are instructed that as it is conceded by the R. J. Reynolds Tobacco Company, that the deceased Avenell Newby was riding in the panel truck of said Tobacco Company as a gratuitous passenger or guest of Hair, then the defendants are liable if the accident resulting in the death of Avenell Newby shall have been caused by the operator through his intoxication or his reckless disregard of the rights of others and if you find from a preponderance of the evidence that anyone of these things was the proximate cause of the death of Avenell Newby, then your verdict should be for the plaintiffs if you find for the plaintiffs upon the other issues." (R.370-371)

to which exceptions were taken "particularly because said instruction does not distinguish between the rights of the said

Hair and the rights of the Reynolds Tobacco Company and Donnelly, but advises the jury in effect that if they should find that Avenell Newby was a guest of Hair's then their verdict should be against the defendants." (R.380-381)

## XXI.

The Court erred in failing to give to the jury appellants' requested instruction number 5 as follows:

"You are instructed that a high rate of speed or even excessive speed in the driving of an automobile is not in and of itself reckless disregard of the rights of a guest riding in said car with said driver," (R.384)

Appellants' exception being "for the reason that the rate of speed or even excessive speed in driving an automobile is not in and of itself an element of reckless disregard of the rights of a guest riding in the said car." (R.384)

## XXII.

The Court erred in failing to give to the jury appellants' requested instruction number 6 as follows:

"You are instructed that if you believe from a preponderance of the evidence that Rulon D. Hair was forbidden by the R. J. Reynolds Tobacco Company to permit anyone to ride in said car as his guest and if you find this instruction was in full force and effect on the 11th day of September, 1942, but that notwithstanding said instruction he hauled Avenell Newby in his car as a guest, you must then find that he was not acting within the scope of his employment and that any injury, if any, that might have occurred to Avenell Newby as said guest, could not have been charged against the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly and no judgment could be rendered against these defendants." (R.384)

Appellants' exception being "for the reason that there was evidence introduced from which the jury could conclude that the instruction, from the Company to Rulon D. Hair, not to carry or haul guests in said car was in full force and effect and that a violation thereof would be outside the scope of his employment." (R.384-385).

### XXIII.

The Court erred in failing to give to the jury appellants' requested instruction number 7 as follows:

"You are instructed that there is a presumption that the driver of an automobile is the owner's agent, but this presumption is rebuttable. Thus, if you should find in this case, that the said Rulon D. Hair, at the time of the said accident was using an automobile which was owned by R. J. Reynolds Tobacco Company and L. R. Donnelly, but that the use thereof was not in the furtherance of the business of either of said defendants, but was being used by the said Rulon D. Hair for his own personal business or pleasure, then and in that event the said R. J. Reynolds Tobacco Company and the said L. R. Donnelly would not be liable for any damage caused by the use of said automobile by the said Rulon D. Hair." (R.385)

Appellants' exception being "particularly because there is evidence in the record clearly indicating and tending to prove that the said Rulon D. Hair was not, at the time of said accident, using said automobile in the furtherance of the business of these defendants or either of them, but on his personal pleasure and outside the scope of his employment," (R.385)

## XXIV

The Court erred in failing to give to the jury appellants' requested instruction number 9 as follows:

"You are further instructed that if you believe from a preponderance of the evidence that on the 11th day of September 1942, Rulon D. Hair was traveling along the highway toward Montpelier, Idaho, with the prime objective of taking Avenell Newby to her home in Montpelier, and that while so driving he was not upon the business of his employer, then and in that event neither the said R. J. Reynolds Tobacco Company nor L. R. Donnelly can be held liable for any damages that might have occurred on said trip even though the said Hair was driving the truck of the said Reynolds Tobacco Company, which may have contained property belonging to said Tobacco Company." (R.386-387)

Appellants' exception being "for the reason that the testimony is that the said Hair was at the time of said accident transporting Avenell Newby to her home in Montpelier, Idaho, and that fact, if it be a fact, that said truck contained products of the Reynolds Tobacco Company would not, under the said testimony, render the other testimony as to the use of said car by said Hair for his personal pleasure and business and not within the employment of the Company, valueless, but that said instruction should have been given in the light of the evidence in this case." (R.387)

## XXV.

The Court erred in failing to give to the jury appellants' requested instruction number 12 as follows:

"You are instructed that if you believe from a pre-



ponderance of the evidence that Rulon D. Hair had been drinking intoxicating liquor and that the said Avenell Newby joined with him and also drank intoxicating liquor, and that the two of them were riding in said automobile while under the influence of such intoxicating liquor, then and in that event you are instructed that the said Avenell Newby assumed the risk of any danger or damage that might result from the use of intoxicating liquor and was contributorily negligent in her conduct, and under such circumstances the plaintiffs cannot recover in this case," (R.388)

Appellants' exception being "for the reason that the law of Idaho is to the effect that if a guest participates and joins with the driver of an automobile in imbibing intoxicating liquor, the guest is equally liable with the driver and is contributorily negligent and assumes the risk of riding in said automobile." (R.388).

## XXVI.

The Court erred in failing to give to the jury appellants' requested instruction number 14 as follows:

"You are instructed that a gratuitous guest or his heirs or legal representatives cannot recover for a host's negligent operation of an automobile if, conscious of apparent danger or faced with such conditions and circumstances as would herald danger to a reasonably prudent man, he fails opportunely to protest or acquiesces therein, and in this case, if you believe from the evidence that Avenell Newby, acting as a reasonably prudent person, should have known that Rulon D. Hair was driving said automobile in a reckless disregard of the rights of others, or that he was intoxicated, and nevertheless continued to ride with him under such conditions, or failed to give timely warning

to him, then you are instructed that her failure to do so would bar a recovery by the plaintiffs, and if you find such circumstances and facts existed, your verdict should be for the defendants," (R.388-389)

Appellants' exception being "for the reason that under the law and the facts in this case, if said Avenell Newby failed to protest in anything which said Hair may have been doing in the driving of said automobile but acquiesced therein, she would have assumed all risk and could not recover in this case." (R.389).

## XXVII.

The Court erred in failing to give to the jury appellants' requested instruction number 15 as follows:

"You are instructed that the plaintiffs have alleged that the defendants, R. J. Reynolds Tobacco Company and L. R. Donnelly, were negligent in permitting Rulon D. Hair to use said automobile knowing him to be a reckless and incompetent driver. Before you can consider this charge against the said R. J. Reynolds Tobacco Company and L. R. Donnelly, it would be necessary for you to find from a preponderance of the evidence, first, that Rulon D. Hair was commonly and ordinarily a careless, reckless and incompetent driver; and, secondly, that such facts were known to the R. J. Reynolds Tobacco Company and L. R. Donnelly. You are further instructed that one incident of carelessness or recklessness brought to the attention of R. J. Reynolds Tobacco Company and L. R. Donnelly, does not in and of itself prove that the party so engaged was habitually a careless or reckless driver, but that before such a matter can be considered by you it would be necessary for you to find from a preponderance of the evidence that the said Rulon D. Hair had committed a number of such acts

to such an extent that it was a habit with him and that a reasonably prudent man knowing of them and all of them, would reasonably conclude that he was of such character; and unless you find all of these facts to be sustained by a preponderance of the evidence you are instructed to disregard this allegation of the plaintiff's complaint and you cannot consider it in arriving at a verdict." (R.389-390)

Appellants' exception being "that one or even two acts of recklessness, carelessness or negligence could not be interpreted as forming a habit or negligence and would not render a driver of an automobile as an incompetent driver or habitually reckless and careless." (R.390)

## XXVIII.

The Court erred in failing to give to the jury appellants' requested instruction number 18 as follows:

"You are further instructed that one act of negligence if you find that one was committed, by Rulon D. Hair prior to September 11, 1942, and brought to the attention of the R. J. Reynolds Tobacco Company or L. R. Donnelly such fact would be wholly insufficient to charge Hair's said employers or either of them, with negligence, and you must disregard such testimony." (R.392)

Appellants' exception being "because under the law, it is not possible for the jury to conclude that a driver was incompetent or careless or reckless by reason of having committed one or two previous acts of negligence." (R.392)

## XXIX.

The Court erred in failing to give to the jury appellants' requested instruction number 19 as follows:

"Even though you find by a preponderance of the evidence that Rulon D. Hair was a careless, reckless and incompetent driver, yet if such was not known to R. J. Reynolds Tobacco Company and L. R. Donnelly, they could not, nor either of them be held negligent in employing Rulon D. Hair, or keeping him in their employment." (R.392-393)

Appellants' exception being "for the same reason as assigned to the refusal to give instruction number 18." (R.393)

**ARGUMENT****I.****THE AMENDED COMPLAINT IS INADEQUATE  
MOTIONS DIRECTED AGAINST IT SHOULD HAVE BEEN  
SUSTAINED**

(ERRORS I TO III)

**(Motion to Dismiss)**

Appellants' motion to dismiss is predicated on the ground that the amended complaint fails to state a claim against appellants or either of them upon which relief can be granted.

Idaho Code Annotated, Sec. 48-901 as amended 1939 Ida. Ses. Laws, Chap. 160, p. 236, known as the Idaho Guest Statute, reads as follows:

“Liability of Motor Owner to Guest. No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of an accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his intoxication or his reckless disregard of the rights of others.”

Before amendment the section of the statute contained the words “gross negligence”; by the amendment those words were deleted and the word “intoxication” was inserted. Thusly, by the amendment, negligence ceased to be a basis of recovery by a guest or anyone claiming under or through a guest. The amendment obviously deals with the operator of the vehicle. Only the operator should be responsible to a guest. An employer, unless the operator, ought not be liable. Cases



seemingly to the contrary, involve statutes containing the words "gross negligence." The rule of respondeat superior, applied under the theory of gross negligence, has caused some courts to hold the employer liable where the employee has injured a guest.

Under the Idaho Guest Statute as amended, it would seem that employer cannot be guilty of "intentional injury," "intoxication" or "reckless disregard of the rights of others." Those phrases are peculiarly and particularly applicable to the operator. For that reason the case of *Manion v. Waybright*, 59 Ida. 643, 86 P 2d 181, decided before the amendment, does not apply.

Under Idaho's Guest Statute no recovery can be had against the driver of the motor vehicle unless the accident shall have been intentional on the part of the driver, or caused by his intoxication or his reckless disregard, etc. There is no allegation in the amended complaint that the accident was caused by an intentional act on the part of Hair, nor by his intoxication. The allegation therein is that Hair "with a reckless disregard of the rights of \* \* \* Avenell Newby, so recklessly drove and operated the said panel truck \* \* \* that the same ran off the said highway, tipped over and inflicted serious injuries upon said Avenell Newby \* \* \* (R.39).

The Supreme Court of Idaho in *Ellis vs. Ashton and St. Anthony Power Co.* 41 Ida. 106, 238 Pac. 517, discusses the meaning of the term "reckless," saying:

"In the Century Dictionary the word 'reckless' is defined as meaning 'desperately heedless.' In the New

Standard Dictionary the term is defined as 'destitute of heed or concern for consequences; especially foolishly heedless of danger, headlong, rash; desperate'. \* \* \* A reckless act, moreover, is always regarded as the equivalent of a wilful one. \* \* \* the terms 'recklessly' and 'wantonly' were regarded as synonymous. \* \* \* it is declared that the word 'reckless' means more than carelessness—it implies wilfulness."

In *Dawson vs. Salt Lake Hardware Co.* (Ida.) 136 P. (2d) 733, the court ruled that the word "reckless" as used in the Guest Statute meant "without thought or care for consequences." It thus seems that one who exhibits "reckless disregard" manifests a wilful or wanton state of mind, or such conscious indifference as to consequences as to amount to wilful intention.

In Ohio the guest statute contains the words "wilful and wanton misconduct." In the case of *Haacke vs. Lease* (Ohio) 41 N. E. (2d) 590, decided June 27, 1941, the complaint therein, held insufficient by Ohio's Supreme Court, was similar to appellees amended complaint herein, as shown by the following taken from that decision: "Plaintiff in his amended petition alleges \* \* \* that the defendant was operating said motor vehicle \* \* \* and that while plaintiff was so riding 'the defendant wilfully and wantonly, \* \* \* drove said motor vehicle so as to cause said motor vehicle to leave the highway'; then follows an attempt to show factual circumstances, being the defendant's act in looking away from the highway for one-fourth mile while driving; his failure to stop or slacken his speed while so driving, and his persistence in such conduct for about one-fourth mile; then followed the allegation that as a direct result of such conduct the

vehicle left the highway, turned over and injured the plaintiff. The Court, in ruling that a motion for directed should have been sustained, said:

"Facts must be pleaded which reveal on their face the element of wantonness, and they must be proved as pleaded. \* \* \*

"To constitute wanton negligence the party doing the act must be conscious of his conduct and must be conscious, from his knowledge of the surrounding circumstances and existing conditions, that his conduct will naturally or probably result in injury."

\* \* \*

The guest must plead unequivocally that the operator had knowledge of existing conditions, otherwise no liability is fixed."

The Indiana guest statute provides for recovery if the accident shall have been intentional on the part of the owner or operator or caused by his reckless disregard of the rights of others. In *Jay vs. Holman* (Ind.) 20 N. E. (2d) 656, quoting from an Indiana case previously decided, the court pointed out the instances wherein liability may exist under its guest statute, as follows:

"First, where the accident resulting in injury was intentionally caused; and, second, where the accident was caused by a reckless disregard of the rights of others, meaning thereby not to relieve from liability where caused when the owner or operator voluntarily does an improper or wrongful act, or, with the knowledge of existing conditions, voluntarily refrains from doing a proper and prudent act, under circumstances when his action, or his failure to act, evinces an entire abandonment of any care, and a heedless indifference to results which may follow, and reck-

lessly takes the chance of an accident happening without intent that any occur."

The wording of appellees' amended complaint to the effect that Hair, with reckless disregard to the rights of Avenell Newby, so recklessly drove and operated the panel truck so that it ran off the highway, thereby inflicting injury to Avenell Newby (R.39), it would seem comes squarely within the reasoning of the cases hereinbefore referred to. There is nothing set forth in the amended complaint from which it can even be remotely inferred that the automobile ran off the highway because of any reckless disregard on the part of Hair, nor that he knew, or had reason to know the surrounding conditions such as to warrant him acting other than as he did. It will be remembered that the evidence shows without dispute that a front tire on the panel truck was shown to have been blown out right after the accident, and Hair testified that he had run into the soft shoulder of the highway in passing a motorist (R.302, which seemingly caused the tire to be blown (R.307-308). The weather was rainy and the pavement wet, which caused the shoulder to be wet; it was when Hair ran into the soft road shoulder that the blow-out occurred and he tried to control the car and keep it from going off the embankment (R.323).

The foregoing testimony is pointed out just to show that in reality no heedless or reckless disregard was shown; on the contrary, due care and circumspection is thereby illustrated; the proof does not approach negligence. Yet that state of facts is with the purview of the allegations of appellees' amended complaint (Par. VIII, R. 39), and is set forth for the pur-

pose of illustrating appellants' contention that no claim is stated against them by such amended complaint. The factual allegations of injury and that the car ran off the highway and tipped over, standing alone, obviously are not charges upon which liability can be predicated; such might happen without fault of any kind on anyone's part. The remaining allegation that Hair drove "with reckless disregard of the rights" of Avenell Newby, is but a conclusion of law and not a statement of fact. Whether or not the manner of driving would support such legal conclusion would depend entirely upon what Hair did factually; even under the most liberal rules of pleading a cause of action cannot be grounded wholly upon legal conclusions.

The remaining element injected into the amended complaint, namely, that appellants permitted Hair to operate the car, "notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instructions," is entirely unsupported by a factual allegation that Hair was a reckless and incompetent driver—innuendo without a basic supporting allegation—thus leaving the amended complaint lacking in factual statements sufficient to support a cause of action. The trial judge was aware of the weakness of the amended complaint when he remarked, "I can see that the complaint may have been better if they had also alleged that he was reckless." (R.192)

For the reasons stated appellants contend that the amended



complaint fails to state a claim for recovery against them or either of them.

### **B. Motion to Strike**

The trial court denied appellants motion to strike a portion of Paragraph VII of the amended complaint, reading:

“notwithstanding that at all of said times the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile, and was in the habit of hauling guests contrary to instructions.” (R.43, 46-47)

The principles involved would seem to be simple and fundamental, since the above quoted language has no bearing upon any cause of action attempted to be pleaded by appellees. The amended complaint contains no allegation that Hair was a reckless or incompetent driver; to allege that appellants hired Hair knowing him to be such, begs the position in the absence of the necessary factual allegations upon which the conclusory matter must rest.

The allegation that Hair “was in the habit of hauling guests contrary to instructions” is, of course, anticipatory. There is no allegation touching “instructions” to Hair—no factual allegation upon which to base the anticipatory and conclusory matter.

It is therefore clear that the amended complaint presumed that instructions had been given touching guests, without the necessary factual allegations; also presumed that Hair was a reckless and incompetent driver, without appropriate allegations to support such inference.

### C. Motion to Elect

Appellees, by their mended complaint, sought to recover upon two different theories (1) that Hair as an agent of appellants while acting within the scope of his employment caused injury to Avenell Newby by his reckless disregard of her rights while transporting her as a guest in appellants' automobile; and (2) that appellants were liable because they entrusted an automobile to Hair knowing him to be an incompetent driver. Appellants moved to require appellees to elect upon which of said theories they intended to rely for recovery (R.61-62). The Court denied the motion (R.64).

These theories are entirely different. The first attempts to hold appellants upon the theory of respondeat superior under the Idaho Guest Statute, while the second attempts to enforce liability on the ground of simple negligence. A different degree of proof is required in each instance. Attempted proof of the second theory necessarily prejudices appellants under the first theory. The difficulties which arose over the admission of the testimony of Sid Close, hereafter argued, is an illustration of this fact. During the trial, the Court seemed to feel that certain testimony would be binding upon Hair (Sid Close's testimony) and that other testimony would be binding only upon appellants (Exhibit No. 22). The confusion which thus arises and the consequent prejudice therefrom could not be helpful in affording any of the defendants a fair trial. Appellees knew in advance what their proof would be and they certainly could have elected upon which of said theories they intended to predicate their claim and the motion

to elect, it is urged, was properly made and should have been granted.

## II.

### **THE TRIAL COURT ERRED IN ADMITTING AND REFUSING TO STRIKE TESTIMONY OFFERED BY APPELLEES DESIGNED TO SHOW HAIR WAS AN INCOMPETENT DRIVER.**

(ERRORS IV to XII)

Over objection of appellants the Court permitted the witnesses Smullen and Buskirt to testify to an accident in which Hair was involved 3½ years prior to the Newby accident; also required Donnelly and Darr to go into details concerning what they had heard about this accident. The questions propounded to these witnesses were objected to by appellants as appears in Errors IV, V, IX and X. The theory of appellees seemingly was that such tended to prove the incompetency of Hair, while appellants contend such was too remote and did not serve such purpose, and the testimony furthermore was immaterial and prejudicial in that at best it was only the accident itself and not the circumstances or details which could be pertinent. The Court also permitted to be introduced the testimony of Sid Close touching a reckless driving charge against Hair in July, 1939. This is set out in Error VI, together with appellants objections. The fact that this testimony was apparently admitted only as against Hair does not cure the error because, so far as Hair was concerned, it was wholly immaterial and it could have no effect except to prejudice appellants. Exhibit 22 was admitted over objections of appellants, all as appears in Error VII. The Court also admit-

ted as evidence a framed photograph of the deceased aimed solely to create sympathy and prejudice. Objection appears in Error XI.

Appellants offered Exhibit 21 which was a duplicate of a letter addressed to Hair in 1940, reciting his freedom from accidents and commending him upon his care as a driver. This offer was denied. Error XII. It tended to rebut any charge of "known" incompetency and was admissible as an office record. In 20 American Jurisprudence, p. 881, Sec. 1943, it is said:

"The truth-telling habits of such business records make them admissible, irrespective of the unavailability of the witness."

When it became apparent that appellees had no further testimony of offer in an attempt to prove incompetence, appellants moved to strike Exhibit 22 and the testimony of Smullen, Buskirt and Donnelly above referred to and to which appellants had objected. This motion is recited in Error VIII. The Court denied the motion.

In all the foregoing rulings appellants contend the court committed error for the reasons recited in the objections and motion set out in the Specifications.

Further bearing on the motion to strike the testimony touching the Myers incident, attention is called to the fact that before the motion was made, L. R. Donnelly had testified very pointedly to the effect that after this accident Hair was re-employed only after a careful investigation and upon positive assurances given by Mr. Hair that he would not in the

future haul any guests in the car. On this point he testified as follows:

"Q. Was there any instructions given to Mr. Hair in respect to that?

A. Yes sir, very emphatic.

Q. What were they?

A. We have a car agreement that Mr. Hair signed. Before an employee is allowed to operate a car, or an employee is hired he is gone into very thoroughly, as to whether he is competent to drive.

Q. What did you find with respect to Hair?

A. I found that he was a competent driver.

\* \* \*

A. After he signed this car agreement, I explained it in detail, and after the accident I sat him down in the hotel room, \* \* \* and I explained to him \* \* that there would be no more passengers in that car, and if it ever was found out that he carried another passenger he would be discharged immediately." (R. 204-205)

Donnelly had also testified that between the dates of the Myers accident and the Newby accident no information whatever came to him of any dereliction on Hair's part, but that much information came proving Hair to be a very competent driver with a very good record, and that he had conscientiously obeyed all rules of the Company (R.207).

Mr. Darr had also testified that no information whatever indicating Hair was in anywise incompetent as a driver, but



that such information as came to the Company was the reverse (R.280). At R. 281 he testified as follows:

“Q. What has Mr. Hair’s record been with the company as to being a careful and competent driver, Mr. Darr?

A. He has a record since April, 1939, up to September 11, 1942, of having had no accident in connection with the Company car, and has received letters of commendation along with merchandise awards in April, 1940, April, 1941, and April, 1942, which he won as a result of having maintained a clear record.” (R.280-281)

The evidence quoted above is undisputed.

When the motion to strike was made, therefore, it was apparent that there was only one incident which occurred and which came to the knowledge of appellants. The question then was: Is one accident  $3\frac{1}{2}$  years before sufficient to permit a jury to determine the competency of the driver? A man perfectly competent may sometimes be negligent, but such does not prove incompetence.

In the case of *Olsen vs. Northern Pacific Lumber Co.*, 106 Fed. 298, it is stated:

“A master cannot be charged with knowledge of the negligent character of a fellow servant of the injured employee by evidence that five years before that on three other occasions during the five years persons working with him had come near being injured.”

In *Guedon vs. Rooney*, (Ore.) 87 (2d) 209, 218, it is stated:

(Quoting from *Davis vs. Shaw*, 1932 La. App. 142 So. 301, 305) "To hold the owner of an automobile liable to a third person for damages caused by one to whom his car had been loaned, 'merely on the ground that the owner had knowledge that such user had previously had an accident while driving an automobile \* \* \* would unjustly deprive both the owner and the non-owner user of such car, of pleasure, recreation, and the benefits to which every citizen of this country is accustomed, if not in a sense entitled.'"

The Oregon court further pointed out "a man perfectly competent \* \* \* may occasionally be negligent, so that one or two specific acts of negligence do not prove incompetence:" also, "that very few automobile drivers can be proven to have neither had an accident nor to have exceeded the speed limit in driving on public highways.

See also *Pittsburgh Rys. Co. vs. Thomas*, 174 Fed. 591, wherein the following jury instruction was approved:

"In order that prior specific acts of negligence by a fellow servant should be sufficient to establish the master's negligence in retaining the servant in his employ, the acts must be the result of incompetence, or of such a character and so constantly committed as to constitute a habit of negligence, rendering the servant unfit to be retained in his position."

The Court also permitted testimony, over objection of appellants, of the arrest, during July, 1939, of a man named B. R. Hair at Dubois, Idaho, without any showing at all that appellants had any knowledge at that time or subsequently, that such incident involved Rulon D. Hair (R. 214, 286-291). The Court allowed the testimony of the witness Sid

Close to be stricken relating to the Dubois incident (R.286-287), and then admitted in evidence Plaintiffs' Exhibit No. 22 over objection of appellants (R.286-291). Such exhibit purported to be a certified copy of a criminal record of the Probate Court of Clark County, Idaho, showing that on or about July 19, 1939, one B. R. Hair drove a motor vehicle in a reckless manner on the public highway.

It is indeed difficult to discern upon what theory the Court allowed the admission of Plaintiffs' Exhibit No. 22. Obviously such a criminal record of a misdemeanor charge wherein the sentence imposed was \$50.00, against a man named in the record as B. R. Hair, Soda Springs, Idaho, would not and could not impart any notice to appellants or either of them that this meant Rulon D. Hair at that time living in Pocatello, Idaho. There is no similarity at all between the Christian initials or names, "Rulon D." and "B. R." Furthermore, the record is clear and undisputed in any way, that neither of appellants ever had any notice or knowledge of the Dubois incident.

The record likewise is clear and uncontroverted that at no time from and after April, 1939, until the accident of September, 1942, did appellants or either of them have any notice or knowledge whatsoever that Rulon D. Hair had ever been involved in any incident of any kind or character, whereby his record as a thoroughly competent driver during that three and one-half years was, or could be in anywise questioned. Nor did they, or either of them have any knowledge of any incident where he may have hauled a guest in the Company's panel truck, other than an employee of the Company.

It thus becomes clear that the Court committed error in permitting appellees to introduce the purported showings having for their purpose the proving of a record of driving incompetency and the hauling of guests on the part of Rulon D. Hair. Obviously such attempted showings utterly failed in the purpose of tending to prove negligence on the part of appellants in employing or reemploying Hair after the happening of the Myers, Pocatello, incident of April, 1939. The Court likewise erred in failing to strike any such evidence adduced by appellees.

### III.

**THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT OF THE JURY AND THE JUDGMENT RENDERED THEREON. THE COURT ERRED IN DENYING APPELLANTS MOTION FOR A DIRECTED VERDICT, AND THEIR MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT.**

(Errors XIII, XIV, and XV)

The theory of appellees appears to be that appellants are liable upon two theories; first, that Hair was an agent and employee of appellants, acting within the scope of his employment at the time of the injury to Mrs. Newby and secondly, that Hair was a careless and incompetent driver and that such fact was known to appellants and they were, therefore, negligent in hiring him and entrusting the panel truck in his care. Both charges were inadequately and, we contend, improperly pleaded and evidence against appellants should not have been admitted thereunder. However, if we assume, for purposes of

argument only, that the pleading is sufficient, the evidence adduced and the law controlling will show that appellees failed to sustain the burden of proof so as to entitle the case to be considered by the jury and that the motion for a directed verdict, or in any event the motion for judgment notwithstanding the verdict, should have been sustained. Appellants will argue these points in the order in which they have been stated.

**1. Hair was outside the scope of his agency in (a) hauling a guest contrary to instructions and (b) in his associations with Mrs. Newby.**

A. The panel truck was owned by the R. J. Reynolds Tobacco Company, and Rulon D. Hair was in its employ as a salesman of its products. When the automobile was entrusted to his care, it was pursuant to a strict written agreement which contained the following language:

"I further agree that I will not use the car for any other purpose than that of furthering R. J. Reynolds Tobacco Company business as directed by my Division Manager. I understand that under no consideration am I to permit anyone, save and except an employee of R. J. Reynolds Tobacco Company, to ride with me in said car." (R. 206 Def. Ex. 14)

Previous to his receipt of this particular automobile, Hair had used other trucks with the same understanding. It was a distinct and definite policy of the Company with which he was well conversant when he was first employed in 1937. He testified that he understood such instructions and was "not to carry passengers at any time outside of the company employees, and not to use the car for personal business whatever."



(R.311). He would occasionally receive bulletins from the company explaining the care he should exercise, which bulletins were formal and sent to all employees and sometimes requested a reply. To one of these bulletins Hair made reply in writing and among other things said: "I shall never carry any passengers outside of my Division Manager." Def. Ex. 23 (R.313).

After working hours on September 10, 1942, Hair yielded to the suggestion of Avenell Newby and took her as his guest to a night club. Here they ate and drank and danced until the club closed about 2:00 or 3:00 o'clock A. M. on the morning of September 11 (R.297). They then drove back to Montpelier and from thence to Soda Springs, Idaho, to visit another night club called The Oasis Club. This club was closed and they thereupon went to the Enders Hotel in Soda Springs where they remained until about noon of September 11 (R.320). They went then to the Oasis Club where they ate and drank and danced until about 2:30 P. M. (R.321). It was then agreed that Hair should take Mrs. Newby back to her home in Montpelier and it was on the return trip that the car upset and she was fatally injured. They had been together on a party of their own for approximately 18 hours (R.316) and during that time Hair was doing no business whatever for the company. Upon his cross-examination, he was asked and answered as follows:

"Q. Now, during that time that you were with her you were not doing any business for the company?

A. None whatever.

Q. That entire time of approximately eighteen hours was a party of your own?

A. Yes sir, it was.

Q. Your trip over to Grace was to tell a Salesman to tell your wife that you would be late getting home that night.

A. Yes sir.

Q. And when you left Grace you went back to Montpelier?

A. Yes sir.

Q. And it was on the way back you had the accident?

A. Yes sir.

Q. Your first object in going back to Montpelier was to take Mrs. Newby home?

A. That would be my first objective I guess.

Q. That is what you intended to do?

A. Yes sir."

This testimony is without contradiction and is in many respects corroborated. The presumption that Hair was on his master's business because he had in his possession his master's car, was entirely overcome and destroyed and under the authorities hereinafter recited it then became a matter for the Court to determine that he was not engaged in his employer's business.

There are two positions definitely sustained by authority supporting appellants on this point in this case, namely, that when Hair disobeyed instructions and took Avenell Newby as a guest in this car, he departed from the scope of his employment and his employer was not liable for injuries that may have thereafter been sustained by her, and his subsequent conduct was such as to show definitely that he had completely departed from his master's business.

In the case of *Chajnacki vs. Dougherty*, (Mich.) 236 N. W. 789, on page 789 the Michigan Court said:

"It is well settled that a master is not liable for the negligent acts of his servant unless at the time the servant is acting within the scope of his employment or within his actual authority. In inviting the plaintiff to ride, the driver of the truck was not acting within the scope of his employment. His act was not only unauthorized but was contrary to the express instructions of his employer."

In the case of *Albers vs. Shell Co.*, (Cal.) 286 Pac. 752, the opinion of the Court is digested in syllabus No. 2 as follows:

"Driver of oil truck held not in course of employment in carrying passenger against employer's rules while making delivery."

On page 757 the California Court said:

"The excerpt which we have taken from this case concerning the course of employment of the driver of the automobile needs no elaboration to show that Winfrid Albers was not injured by the defendant Morton while Morton was in the course of his employment. Morton was employed to drive the truck

down the highway leading to the bridge where the accident occurred, to deliver gasoline and oil, and was not employed to transport either a guest, a licensee, or a trespasser."

In the case of *Hartigan vs. Public Ledger*, (Pa.) 140 Atl. 524, the opinion of the Court is digested in syllabus No. 2 as follows:

"Employer is not liable for injury to boy falling off delivery truck on which he was riding with employee's consent, where the employee had permitted the boy to ride against express orders not to permit anyone to ride without permission of employee's superiors."

On page 525 of 140 Atl., the Pennsylvania Court said:

"Even if negligence had been proved there could be no recovery. In *Perrin vs. Glassport Lumber Co.*, 276 Pa. 8, 119 Atl. 719, the driver had instructions not to allow others to ride on the truck. We said in that case 'though the plaintiff was on the car by invitation or permission of the employee, unless consent was authorized, properly or impliedly, the employer is not to be held liable, except for injury resulting from some willful act. He had no implied authority to permit boys to ride on his truck and acted beyond the scope of his employment when he did so. The master, short of wantonness, did not owe him the duty of safe carriage or to see that he was safely alighted.'"

So it is in the case at bar. Appellants certainly did not owe Avenell Newby the duty of safe carriage when she became Hair's guest in an escapade which was a complete departure from Hair's employment.

Additional cases supporting the foregoing rule are:

Psota vs. Long Island Ry. Co. (N.Y.), 159 N. E. 180;

Jewell Tea Co. vs. Sklivis (Ala.), 165 So. 824;

Welch vs. O'Leary (Mass.), 191 N. E. 377;

Foley vs. John H. Bates, Inc. (Mass.), 4 N. E. (2d) 349;

Cula vs. Turmelie, 5 N.Y.S. (2d) 811.

Appellees recognized the foregoing rule of law in their pleading and in certain evidence which they offered in this case. In paragraph XVII of the amended complaint, they attempted to allege that appellants knew Hair "was in the habit of hauling guests contrary to instruction" (R.39), and they introduced scattered bits of testimony in attempt to show an infraction of this rule by Hair to which we will presently refer. This rule is inferentially admitted to be correct by the Idaho Supreme Court in the case of Manion vs. Waybright, 59 Ida. 643, 86 Pac. (2d) 181, wherein the Court's opinion is expressed in syllabus No. 7 as follows:

"In action for death of guest who was riding in defendant's automobile driven by defendant's employee, evidence supported jury's finding that violation of rule forbidding defendant's drivers from carrying passengers was so common and notorious as to have been abrogated."

In the case at bar, there is no common or notorious violation of this rule. Except for the one instance of the Myers accident which occurred  $3\frac{1}{2}$  years before, neither of appellants had any knowledge or information that Hair ever carried a



guest in his car (R.207, 278-279). Hair had worked for the company about five years immediately prior the Newby accident and admitted that during such time he violated this rule "four or five times" (R.329). Most of these violations occurred in transporting his wife. Aside from the Myers incident, being the only one known to appellants where anyone other than an employee of the company had been with Hair in the car, the entire testimony on this point is limited to the above statement. It is not possible for one to conclude that such circumstances constituted such violation of the rule as to be common and notorious or such that one could reasonably conclude that the master knew of it. Furthermore it is noted that there is no evidence of violation of this rule, with the panel truck involved in the accident, until the Montpelier incident. It is, therefore, most earnestly urged that the evidence is entirely insufficient in law to prove a waiver of the rule and therefore such rule must stand as a controlling factor in this case.

B. There are other facts conclusively proving that Hair was not acting within the scope of his employment at the time of the accident nor for 18 hours theretofore. These facts have heretofore been enumerated. He was definitely out on a party of his own. There isn't a thing in the testimony from which one could conclude that he was furthering his master's business. The fact that he had his master's car while thus violating his master's instructions, might be argued as raising a presumption in the first instance that he was on his master's business, but that presumption was definitely destroyed by the evidence produced and above referred to, and the question then became one of law for the Court to determine and not for the jury.

The Idaho Supreme Court in the case of *Willi vs. Schaefer Hitchcock Co.*, 53 Ida. 367, 371, 25 Pac. (2d) 167, said:

“The fact of ownership alone, regardless of the presence or absence of the owner in the car at the time of the accident, establishes a *prima facie* case against the owner, for the reason that the presumption arises that the driver is the agent of the owner. \* \* \*

“It is equally well settled that, where the evidence offered to establish facts which would rebut this presumption \* \* \* are undisputed and uncontradicted, it becomes properly a question for the court.”

In the case of *Magee vs. Hargrove Motor Co.*, 50 Ida. 442, 296 Pac. 774, the Idaho Supreme Court affirmed the trial Court in the granting of a non-suit in favor of the owner of an automobile whose employee was using the automobile on a pleasure trip of his own. The Court, on pages 446 to 448, said:

“Generally speaking, the owner of an automobile can be held responsible for its negligent operation by another only when, at the time of the accident, the relationship of principal and agent or of master and servant existed between the owner and the operator, and the agent or servant was at that time acting in furtherance of the owner’s business. (Annotations, 42 A.L.R. 899; 22 A.L.R. 1397; 17 A.L.R. 621; *Baldwin vs. Singer Sewing Mach. Co.*, 49 Ida. 231, 287 Pac. 944.) Thus, if it be shown that the person driving the car was at the time of the accident an independent contractor, or an agent or servant of the owner but using the car for his own business or pleasure, the owner is not subjected to liability. (22 A.L.R. 1400; 2 *Blashfield’s Cyclopedia of Automobile Law*, p. 1320, sec. 5, p. 1391, sec. 23, p. 1419, sec. 32; 17 A.L.R. 621 et seq.; *Potchasky vs. Marshall*, 211 App.

Div. 236, 207 N.Y. Supp. 562; *Stauffer vs. Schilpin*, 167 Minn. 301, 208 N.W. 1004; *Barton vs. Studebaker Corp.*, 46 Cal. App. 707, 189 Pac. 1025; *Premier Motor Mfg. Co. vs. Tilford*, 61 Ind. App. 164, 111 N.E. 645; *Goodrich vs. Musgrave Fence & Auto Co.*, 154 Iowa, 637, 135 N. W. 58.)

\* \* \*

"If the view be taken that the driver of the car in the instant case was an agent or servant of the defendant company for whose acts the company might be answerable, it is clearly shown that at the time of the accident he was in nowise engaged in furtherance of the master's business but was using the car on a purely pleasure trip. The day was Sunday a hunting trip was suggested and Malicote agreed to furnish the car. The party set out with guns and started out of town in the direction they had gone other times to shoot doves. When they met the deceased he was told the nature of the outing and decided to participate in the fun. Not a word or intimation about the sale of any car, but positive and convincing evidence of a party entirely pleasure-bent.

"Any presumption that might attach that the driver was an agent or servant of the owner of the car is overcome by plaintiff's own evidence. (*Potchasky vs. Marshall*, *supra*.) Such an inference does not require that every case shall go to the jury, where the undisputed and uncontroverted evidence establishes the facts so conclusively that the inference is overcome. (*Curry vs. Bickley*, 196 Iowa, 827, 195 N.W. 617.) And such presumption may be rebutted and overcome by evidence adduced during the trial by the testimony of any of the parties to the suit. (*International Co. vs. Clark*, 147 Md. 34, 127 Atl. 647.) \* \* \*

"The facts brought out by the plaintiff in this case clearly show that the driver of the car was not an agent or servant of the defendant company acting within the scope of his employment at the time of

the accident, and it was the duty of the court to declare the one reasonable inference from the facts, as a matter of law, and to act favorably upon the motion for nonsuit for the failure of plaintiff to prove a sufficient case for the jury."

In the case of *Baldwin vs. Singer Sewing Mach. Co.*, 49 Ida. 231, 287 Pac. 944, it was held as a matter of law that one employed to sell sewing machines was acting entirely on his own behalf and was not acting within the scope of his employment, where, after a business trip outside of the city, he returned, parked his car, went to the company's office, and, finding no one there, went to a cafe for supper, did several errands, and was on his way home when his car struck a pedestrian. Beginning on page 237 the Court said:

"\* \* \* A servant may undoubtedly step aside from his employment and thereafter by returning to it subject his master to liability for ensuing negligence. But there must be some time when the servant's active employment ceases. In this instance, Anderson had returned in the evening to Boise. He parked his car and went to the company's office because, as he said, he supposed there was somebody there and he would 'call in.' Finding none of the office force there, he evidently considered the day's work done and busied himself no further about the company's business whatever. Supper at the cafe, reading the evening paper 'thoroughly,' going several blocks to the postoffice and the plant of the 'Capital News' did not consume any time or postpone any duty reserved or due the company. The mere betaking of himself and his own property home could not have served to restore him to the company's employment. After reaching Boise, had he continued homeward, it might be said that he was concluding a trip made in his employer's business, but he terminated his trip at his own option when he went

to the company's office, choosing to go home when in the fullness of time it pleased him. It was none of the company's business whether he went home or stayed downtown, 'negotiating the talkies and noodle joints until the wee sma' hours. Had he done so, no such belated return to an awaiting mattress could be said to have been undertaken in his employer's business. Under the admitted facts, it must be held as a matter of law that defendant Anderson at the time of the collision was acting in behalf of himself and none other. Defendant company's motion for nonsuit should have been sustained."

This Court has announced this rule in the case of Department of Water and Power vs. Anderson, 95 Fed. (2d) 577, wherein it held that the owner of the automobile was not liable under the doctrine of respondeat superior for the negligent conduct of the servant who was driving the car, because the servant was not within the scope of his employment at the time of the accident. On page 583, the Court said:

"That general rule is applicable to cases where the servant is operating an automobile. As a congener to this rule, it is generally held that the master is not liable for injury or damage resulting from the negligent operation of his car by his servant, while the latter is using it for his own purposes without the owner's permission or consent. Annotations: 22 A.L.R. 1397; 45 A.L.R. 477, 478; 68 A.L.R. 1051, 1052; 80 A.L.R. 725, 726; 5 Blashfield, *Cyclopedia of Automobile Law and Practice*, Permanent Edition, 157, Sec. 3023. The same rule applies although the master has consented to the use of the automobile by the servant. Annotations: 22 A.L.R. 1397, 1400; 45 A.L.R. 477, 480; 68 A.L.R. 1051, 1053; 80 A.L.R. 725, 727."

In *Caldwell vs. Miller* (Cal.), 141 Pac. (2d) 745, the



principle of law here under consideration is aptly expressed in the syllabus as follows:

“Where owner and driver of automobile accompanied by girls traveled in search of amusement, driver was not acting as owner’s ‘agent’ so as to render owner liable for girl’s injuries resulting from accident caused by driver.”

In *White vs. Firestone Tire and Rubber Co.*, 90 Fed. (2d) 637, the Fourth Circuit considered a case where an employee for the company was entrusted with an automobile to be used in his business as a salesman. The automobile had printed the word “Firestone” on each door. The salesman was employed upon a salary and his duty was to call upon agents and dealers who handled Firestone products and to take orders and make suggestions as to their stock and solicitation. The car was to be used only for Company purposes. On Friday, October 16, 1931, the salesman took the Company car and transported several of his friends to a football game. One of the members of the party was named J. C. Gillis, who owned a chain of filling stations. Prior to reaching the football game, they stopped and did some drinking and took a bottle or two to the game. After the game, the plaintiff, while driving along the highway and returning home, collided with another automobile and as the result of the accident, the drivers of both cars were killed and the plaintiff who was a passenger in the other car was injured. She brought suit against Firestone Tire & Rubber Co. upon the theory that its agent, while acting within the scope of his employment, negligently caused the injury. The trial court granted defendant’s motion for a directed verdict

and the Fourth Circuit Court affirmed the ruling. On page 639, the court said:

“We are of the opinion that the evidence does not support any of these theories. On the contrary, the Firestone Company was clearly entitled to a directed verdict. Before a master is responsible for the torts of his servant, the servant must not only be acting in the course of his employment, or within the scope of his authority, but must be actually engaged in his employer’s business at the time of the injury. *P. F. Collier & Son Distributing Corporation vs. Drinkwater* C.C.A. 4th) 81 F. (2d) 200, 204; *Martin vs. Greensboro-Fayetteville Bus Line*, 197 N.C. 720, 150 S.E. 501; 3 C.J.S., Agency, 187. The general rule is well established. The master’s responsibility cannot be extended beyond the limits of the master’s work. If the servant is doing his own work, or that of some other, the master is not answerable for his negligence in the performance of it. *Standard Oil Co. vs. Anderson*, 212 U.S. 215, 221, 29 S.Ct. 252, 254, 53 L.Ed. 480. *Elkhorn Piney Coal M. Co. vs. Hazelett* (C.C.A. 6th) 62 F. (2d) 137, 138.

“There is no evidence that Garrett attended to any business of the Firestone Company either in Florence or en route, or that the trip was to any degree a part of his employment. On the contrary, the undisputed evidence shows that the trip was arranged for the sole purpose of attending the football game. There is not a scintilla of evidence to show that Garrett left his territory for the purpose of taking another salesman home. The undisputed evidence shows that Gillis, the customer, actually promoted the party, furnished the liquor which was taken on the trip, and took with him as a member of the party, his guest Scott, who was a stranger to Garrett. Nothing was done on the trip by Garrett in the performance of his master’s work, in whole or in part, directly or indirectly. This is not a case where, in the course of a continuing relation,

both business and private ends have been coincidentally served, but is a 'departure so manifest as to constitute a complete abandonment of duty, exempting the master from liability until duty is resumed.' Notes, 17 A.L.R. 621; 29 A.L.R., 470. *Peabody vs. Marlboro Implement Co.*, 63 App. D.C. 288, 72 F. (2d) 81."

In the case of *Allen vs. Ross*, (Ark.), 138 S.W. (2d) 409, the court held that a Tobacco Company salesman who was driving up and down the road in search for a woman companion who had gone with him on a pleasure trip in Tobacco Company's truck which was loaded with Tobacco Company's products, was not then acting "in the scope of employment," notwithstanding the salesman had made a collection for the Company and the Tobacco Company was not liable for injuries resulting from the negligent operation of the truck.

It may be contended by appellees that R. J. Reynolds Tobacco Company's sign was printed on the panel doors of the truck driven by Hair and that it contained some products manufactured by the Company. This makes absolutely no difference in determining whether or not the driver was acting within the scope of his employment. In the two preceding cases, these facts appear. Nevertheless, the court in each instance held the owner of the truck was not liable.

In the case of *Saltas vs. Affleck* (Utah), 102 Pac. (2d) 493, a driver of a grocery delivery truck owned by the defendant, without permission, made his last delivery on the noon trip after picking up two girls whom he had promised to give a ride to the business section of the city. On the trip he became involved in a collision in which a boy was killed.

The Utah Court held that the employee's action in picking up the girls and transporting them, was not a mere deviation but was a departure from the course of employment and the employer's responsibility for employee's acts had ceased as a matter of law.

In the case of *Loucks vs. R. J. Reynolds Tobacco Co.*, 188 Minn. 182, 246 N. W. 893, a salesman whose duty included the posting of advertising signs, was furnished by the company with a car for use on its business only, being forbidden to give rides in the car to persons other than to employees of the Company, and was given positive instructions to do certain work in a specified way on a Saturday; but the salesman started out Friday evening to drive the car to a lake in order to go fishing over the weekend, carrying as passengers his brother and brother-in-law. An accident happened on the way. A suit was instituted for the injury against the Tobacco Company. It was held that the employee was not acting within the scope of his employment, although he testified that he planned to post signs on trees, which covered counties outside of his territory. On page 896 the court said:

"We are of the opinion that when Begley took appellant's car on the trip from St. Paul to Prior Lake, he was not acting as the agent and employee of appellant within the scope and course of his employment, but, on the contrary, that he was a wrong-doer, and appellant was not liable for his acts."

In the case of *Hunter vs. First State Bank*, 181 Ark. 907, 28 S. W. (2d) 712, the court said:

"The test of the owner's liability for the negligence of his employee in injuring the property or

person of three persons while driving the farmer's automobile, in the nature of its use at the time of the accident—whether or not it is being used in the transaction of business of owner of the automobile. The very basis of the rule of respondeat superior as applied to automobile accidents as well as to other cases, is that the driver of the car is acting for the owner and not for himself personally, at the time of the accident. When the servant steps outside of the master's business and enters upon the performance of some individual purpose of his own, he ceases to act as a servant of the owner, and the latter's responsibility for his acts terminates."

It would be difficult to find a situation where an employee was more definitely on some individual purpose of his own than was Hair at the time of this accident. That he was definitely outside the scope of his employment seems conclusively proved.

There are numerous cases to the same effect as those above cited. Some of them are:

McCammon vs. Edmonds (Cal. App.), 299 Pac. 551;

Reddy Wildhauer-Moffett Co. vs. Spiney (Ga. App.) 185 S. E. 147;

Slinkard vs. National Machine & Tool Co. (Mich.) 265 N. W. 494;

McIntee vs. Baker, 268 N. W. 661;

Ewer vs. Cappe (Minn.) 271 N. W. 101;

Cain vs. Marquez (Cal.) 88 P. (2d) 200;

Usher vs. Stafford (Ia.) 288 N. W. 432;



Holder vs. Haynes (S.C.) 7 S. E. (2d) 833;

Nichols vs. G. L. Hight Motor Co. (Ga. App.) 10 S. E. (2d) 439;

Keen vs. Clarkson (Ariz.) 108 P. (2d) 575;  
Lombardi vs. Silver (Ohio App.) 32 N. E. (2d) 558;

Cunningham vs. Union Chevrolet Co. (Tenn.) 148 S. W. (2d) 633;

Montgomery vs. Hutchins (C.C.A. Cal.) 118 F. (2d) 661;

Wilson vs. Farnsworth (L. App.) 4 So. (2d) 247;

Brand vs. Vinet (L. App.) 5 So. (2d) 200;

A. S. Abell Co. vs. Sopher (Md.) 22 A. (2d) 462;

Riddle vs. Whisnant (N.C.) 16 S. E. (2d) 698;

Bayless vs. Mull (Cal.) 122 P. (2d) 608;

Fooks vs. Williams (Ark.) 168 S. W. (2d) 193;

## **2. Hair Was Not An Incompetent Driver**

In the case at bar, appellees alleged in their amended complaint that Rulon D. Hair had permission and authority from appellants to use and operate said panel truck upon the public highways of the State of Idaho, notwithstanding that at all of said times they "knew Rulon D. Hair was a careless, reckless and incompetent driver of an automobile." There is no allegation that he was an incompetent driver, except by

the innuendo aforesaid. Upon this point the court permitted the introduction of evidence touching an accident in which Hair was involved in Pocatello, Idaho, April 15, 1939—approximately  $3\frac{1}{2}$  years before the Newby accident. The Court also permitted to be introduced in evidence plaintiffs' Exhibit No. 22 heretofore referred to, being a judgment docket of the Probate Court of Clark County, Idaho, reciting that one "B. R. Hair of Soda Springs, Idaho, on or about the 19th day of July, 1939" was convicted of driving a motor vehicle on the public highway in a reckless manner. While the appellants knew of the Myers accident, neither of them knew of the Dubois incident, and we submit that such record could not possibly have imparted information. We then have to consider this one question: Is one accident, which happened  $3\frac{1}{2}$  years before the accident complained of, in and of itself sufficient to establish the status of a driver as reckless and negligent such as to impose liability upon one who might thereafter employ him? In considering this point, it is to be borne in mind that the evidence is very clear that he had a perfect driving record between these two dates (R. 207, 271, 280-281, 285) and was given an award by the company as evidence of such fact. Under this state of facts, appellants contend that there was no adequate proof upon which the case should have been submitted to the jury and none upon which the jury could find that Hair was an incompetent driver or that the company had such information.

Almost all of the authorities upon this phase invariably deal with drivers who are addicted to drunkenness, afflicted with some mental or physical disorder, or are of such tender

years as to be calculated to appraise an employer of their status. None of such facts were alleged or attempted to be proved in the instant case.

In the case of *Pittsburgh Rwy. Co. vs. Thomas*, 174 Fed. 591, the Fifth Circuit Court of Appeals draws a distinction between negligence and incompetency. An employer would not be liable simply because the employee had been negligent on previous occasions unless such negligence tended to prove incompetency. On page 595 the Fifth Circuit Court said:

“A man perfectly competent in all respects for the duty he undertakes to perform, may occasionally be negligent, so that one or two specific acts of negligence do not prove incompetence. It must be either shown that the so-called negligent acts were the result of incompetence, or were of such a character and so constantly committed as to constitute a habit of negligence, rendering the servant unfit to be retained in his position, for unfitness, as well as incompetency, is a disqualification for employment.”

In *Guedon vs. Rooney*, 87 (2d) 209, on page 218, the court said:

“In cases in which it is sought to hold the owner of an automobile liable on the theory that his negligence in lending a car to an incompetent driver was in fact the cause of injury to the plaintiff, the better rule is to require such incompetence of the driver to be shown by specific acts of carelessness and recklessness committed by him. The car owner's knowledge of the driver's incompetence may be shown either by evidence that he in fact knew of such acts or by evidence tending to show that the driver's incompetence was generally known in the community. In this connection it must be borne in mind, as stated in the case of *Pittsburgh Rys. Co. vs. Thomas*, *supra*, that ‘a

man perfectly competent \* \* \* may occasionally be negligent, so that one or two specific acts of negligence do not prove incompetence. It must be either shown that the so-called negligent acts were the result of incompetence, or were of such a character and so constantly committed as to constitute a habit of negligence.' (174 F. 595). And in *Davis vs. Shaw*, 1932, La. App., 142 So. 301, 305, it was pointed out that to hold the owner of an automobile liable to a third person for damages caused by one to whom his car had been loaned, 'merely on the ground that the owner had knowledge that such user had previously had an accident while driving an automobile or had on some previous occasion, been vaguely and generally accused of speeding and recklessness, would unjustly deprive both the owner and the non-owner user of such car, of pleasure, recreation, and the benefits to which every citizen of this country is accustomed, if not in a sense entitled.' The court in the latter case further noted that very few automobile drivers 'can be proven to have neither had an accident' nor to have exceeded the speed limit in driving on public highways."

In the case of *Olsen vs. Northern Pacific Lumber Co.*, 106 Fed. 298, this point is further discussed and the opinion of the Court is digested in syllabus No. 4 as follows:

"A master cannot be charged with knowledge of the negligent character of a fellow-servant of the injured employee by evidence that five years before that on three other occasions during the five years persons working with him had come near being injured."

The appellees at the trial of this case relied upon *Department of Water and Power vs. Anderson*, 95 Fed. (2d) 577, to support their position that recovery could be sustained

upon the allegation that Hair was a careless, reckless and incompetent driver. It is contended this case is not in point. It is entirely different on facts. In the Anderson case the driver was charged with the excessive use of intoxicating liquor which caused his alleged incompetence and that such was known to his employer. Evidence was introduced that Nicoll, the driver, "was well known for drunkenness" that he had been frequently seen drinking whiskey at roadhouses and that his foreman knew that he was frequently drunk. It was on this evidence that the driver's status of incompetence was determined—not because he had one or two prior accidents. There is no testimony in this record that Hair was accustomed to drinking. For a period of over three years, between said accidents, he had a spotless record. There is not a scintilla of evidence known nor which could have been known to appellants or either of them between these two accidents which could have given any suggestion that Hair was an incompetent driver. On the contrary, everything was the reverse. The question, therefore, is: Will an automobile accident definitely stamp the driver involved with incompetency and make employment of him thereafter dangerous for an employer, thus forever limiting a drivers right to make a living? We think the statement of the question suggests clearly its answer.

It is most earnestly contended that as matter of law, the evidence is wholly insufficient on either theory to sustain the verdict of the jury, and the trial court should have granted a directed verdict.



### **3. Assumed Risks and Contributory Negligence of Guest Precluded Recovery.**

Appellants further urge that the evidence is wholly insufficient to support a verdict in favor of a guest. Appellees have no greater rights than Avenell Newby would have had, had she been not killed but only injured. See *Northern Pacific Railroad Co. vs. Adams*, 192 U. S. 440, 24 Sup. Ct. 408, 48 Law Ed. 513. Avenell Newby was a guest of Rulon D. Hair at the time of the accident as that term is defined in the Idaho Guest Statute. Her rights are limited by the terms of this Statute. She could not recover on the theory of simple negligence, but only if the evidence disclosed that the accident was intentional on the part of the driver or caused by his intoxication or reckless disregard for her rights. The complaint does not charge that the act was intentional or that the driver was intoxicated. Appellee's theory of reckless disregard seems to be predicated upon speed. McGuire testified that Hair passed him on the highway about 8 or 10 miles from the scene of the accident traveling around 60 miles per hour (R.99). Hair testified that he was driving about 35 miles per hour (R.301). Fast driving is not in and of itself reckless disregard nor willful wantonness.

*Lutfgy vs. Lockhart, Ariz., 295 Pac. 975.*

The only other evidence relied upon by appellees showing reckless disregard is the distance the car traveled before stopping and its markings on the highway. These facts are explained by a blowout of the right front tire (R. 307-308, 335). Such evidence, it is contended, is insufficient to prove reckless disregard for the rights of a guest.

There was, however, some testimony that Hair and Mrs. Newby had been drinking intoxicating liquor, but as above indicated, such is not relied upon in the pleadings. However, it appears in the record and must be considered. Both Hair and Mrs. Newby drank some intoxicating liquors (R. 297, 321). The odor of alcohol was upon her breath when taken to the hospital (R. 165-166). A fair presumption of the evidence is that she drank as much as Hair. During the trip, and particularly between Soda Springs and the point of the accident, she made no protest or objection as to the manner or method Hair drove the car and made no remark about his driving. She was in the front seat of the car and was just as able as was Hair to see what was going on (R.300-301). Under such circumstances, she assumed all risks attendant upon such a trip, including the rate of speed and the manner in which Hair operated the car, and was as a matter of law contributorily negligent if Hair did anything which might otherwise have violated the Guest Statute. Under such circumstances, there were no facts upon which a jury could pass in determining whether or not there was liability. The Court should have dismissed the case. This statement of the law is definitely supported by the great weight of authority.

In the case of *Dale vs. Jaeger*, 44 Ida. 576, 258 Pac. 1081, a guest was injured as result of an accident caused by excessive speed. The Court held a judgment of nonsuit should have been granted and that a gratuitous guest may not recover for his host's negligent operation of an automobile, if, conscious of apparent danger or faced with such conditions and circumstances as would herald danger to a reasonably prudent man,

he fails opportunely to protest and acquiesces therein; that while contributory negligence is generally a question of fact, it becomes a matter of law for the court's determination when established facts and circumstances permit only one possible conclusion to be drawn by a reasonably prudent man. The opinion of the court is digested in Syllabus No. 3 as follows:

“Contributory negligence of gratuitous guest in automobile in failing to protest against driver's proceeding at excessive speed held to preclude recovery for injuries resulting when car left the road on a sharp curve and crashed into a telephone pole.”

On page 580 of the Idaho Report, the court said:

“The law is well settled by authorities too numerous to cite, that a gratuitous guest cannot recover for his host's negligent operation of an automobile, if conscious of apparent danger or faced with such conditions and circumstances as would herald danger to a reasonably prudent man, he fails opportunely to protest or acquiesces therein.”

See also, the same effect, *Dillon vs. Brooks*, 51 Ida. 510, 6 Pac. (2d) 851.

In the case of *French vs. Tibben*, 53 Ida. 701, 27 Pac. (2d) 475, this same law is again applied by the Idaho Court in a case wherein there had been fast driving upon the highway and the guest and the driver had been drinking intoxicating liquors. The opinion of the court is well digested in the syllabi as follows:

“Occupant of automobile is guilty of contributory negligence, precluding recovery against driver for injuries due to driver's intoxication if occupant furn-

ished liquor or knowingly rode with intoxicated driver."

Also

"Gratuitous guest cannot recover for host's negligent operation of automobile if guest is conscious of danger or faced with conditions indicating danger, and fails opportunely to protest."

In *Whitsett vs. Morton* (Cal.) 33 Pac. (2d) 54, it is held that it is contributory negligence for a guest to go to sleep while riding with intoxicated automobile driver.

In *House vs. Schmelzer* (Cal.) 40 Pac. (2d) 577, it is held that a guest who had been drinking with driver and who failed to notice driver's intoxicated condition, was contributorily negligent, precluding recovery for injuries received when automobile ran off the road and overturned.

In *Schwartz vs. Johnson*, Tenn. 280 S. W. 32, it is held that intoxicated guest accompanying intoxicated driver of an automobile operated at negligent speed was contributorily negligent precluding recover for death.

The foregoing cases, which are illustrative of the overwhelming weight of authority on this point, should preclude recovery as matter of law of appellees' claiming through and under *Avenell Newby*.

See also:

*Willoughly vs. Driscoll* (Ore.) 121 Pac. (2d) 917;

*Packard vs. Quenel* (Vt.) 22 Atl. (2d) 164.

Russell vs. Bayne (Ga.) 163 S. E. 290.

For the foregoing reasons ,therefore, it is contended that this case should never have been submitted to the jury, but that the Court should have directed a dismissal.

#### IV.

#### **ERROR IN GIVING INSTRUCTIONS TO WHICH EXCEPTIONS WERE TAKEN, AND IN REFUSING TO GIVE CERTAIN REQUESTED STRUCTIONS.**

#### **ERRORS XVI to XXIX)**

It is fundamental that the instructions to a jury must fairly cover the issues to support which evidence has been admitted. Furthermore, as said in Pullman Co. vs. Hall, 46 Fed. (2d) 399, on page 404 "It is reversible error to submit the evidence and theory of one party prominently and fully \* \* \* and not to call attention to the main points of the opposite party's case." Defendant is entitled to have given to the jury proper instructions covering his theory of the case.

Idaho Gold Dredge Corp. vs. Boise Payette Lumber Co. (Ida.) 133 Pac. 1017;

Jones vs. Mikest, 60 Ida. 680, 95 P. (2d) 575;

Larsen vs. Bliss (N. Mex.) 91 Pac. (2d) 811.

Instructions should be clear and where contradictions appear therein, the cause may be reversed.

Skelton vs. Great Northern Ry. Co. (Mont.) 100 Pac. (2d) 929;



Westberg vs. Willde (Cal.) 94 Pac. (2d) 590.

While these principles are axiomatic, yet it is urged they were disregarded in the instant case. Appellants made formal exceptions to five instructions given by the Court and proposed ten which were refused. In each instance, the position of appellants and the reasons for excepting to, and proposing said instructions were given. The instructions and reasons appear verbatim and at length in the Specification of Errors. These reasons may also be considered as argument for appellants' position.

It must always be remembered that this is a case under the Idaho Guest Statute. Appellants were not drivers of the motor vehicle. They can, under no circumstances, be held to a greater degree of liability than the driver, who cannot be held for simple negligence, but for only a violation of the express provisions of the Statute.

See:

Gifford vs. Dice (Mich.) 257 N. W. 830;

Holmes vs. Wester (Mich.) 265 N. W. 492.

#### **A. Error In Instructions Given**

In the instruction quoted in Error XVI, the court, in effect, enlarged the responsibility of appellants beyond that of Hair by telling the jury that they could consider the Myers accident and the Dubois incident as against appellants but not as against Hair and, in this instruction, the Court referred to "evidence pertaining to the arrest and plea of guilty of Rulon D. Hair in Dubois, Idaho, in 1939 for an alleged violation

of a traffic law." During the trial, the Court had admitted evidence of this purported violation as against Hair but not as against appellants, save and except for Exhibit No. 22, which was a certified copy of a Probate Court record of Clark County touching a plea of guilty of *B.R. Hair of Soda Springs, Idaho*. If the Court meant to refer merely to the exhibit, the instruction certainly should have been so limited, but no such limitation appears and as the instruction was given to the jury, they could clearly consider all of the evidence touching the Dubois incident notwithstanding the fact that the oral testimony was not introduced as against appellants and Exhibit No. 22 was not such as could impart any information touching *Rulon D. Hair of Pocatello*. Nowhere in the instructions given was this matter in anywise cleared up. Furthermore, as heretofore pointed out, neither of these incidents, nor both of them taken together, constituted sufficient proof to establish the status of Hair as one habitually careless or incompetent. The instruction undoubtedly tended to mislead and confuse the jury.

In the instruction quoted in Error XVII, the Court attempted to summarize the Statute Law of Idaho covering ordinary negligence in the operation of a motor vehicle upon the highway. The jury was advised that it was unlawful for any person to drive any vehicle upon the highway carelessly and heedlessly without due caution and circumspection and at a speed in excess of thirty-five miles per hour. This entire instruction deals with simple negligence and is not in anywise involved in a consideration of the Guest Statute. Exception was taken to the giving of the instruction, particularly because it

had no application in the present case, which was not controlled by the law of simple negligence, but by the requirements of the Guest Statute and that said instruction tended to confuse and mislead the jury as between the statute law of simple negligence, and the guest law requiring proof of different types of conduct, namely, intentional injury, intoxication or reckless disregard of the rights of others. A guest who is injured cannot recover simply because the driver has been negligent. He is limited in his rights of recovery to one of the three derelictions above mentioned. When the Court, therefore, instructed the jury that it was *prima facie* unlawful for any person to exceed the speed of thirty-five miles per hour upon the highway, it, in effect, told the jury that appellants were liable if an accident occurred from whatever cause if the car was being driven faster than thirty-five miles per hour. There was no occasion for any part or portion of this instruction to be given to the jury. It did not contain any law applicable to this case. Its effect was to enlarge in the minds of the jury the rights of a guest and to entirely eliminate the effect of the Guest Statute. It is submitted that there are no instructions which were given that could or did minimize the damaging effect of this instruction. This error alone is so prejudicial as to make it necessary to reverse the case.

The instruction quoted in Error XVIII advised the jury that a servant may be presumed *prima facie* to be acting in the course of his employment if at the time of the accident he is in possession of the master's automobile. Appellants excepted to such an instruction because it did not go far enough and advise the jury that such a presumption could be overcome

by evidence showing that the car was being used for other purposes. That unquestionably is the law, yet there is nothing in this or in any instruction of the Court giving the jury to understand that this presumption could be overcome. Furthermore, the Court had already given an instruction to the effect that "you are instructed that one driving an automobile owned by another is presumed to be the agent of the owner of said automobile." To follow this up in the same set of instructions with the one to which appellants have taken exceptions, simply emphasizes the error of which appellants complain.

The instruction quoted in Error XIX, advised the jury that if Hair had previously to the 11th day of September, 1942, disobeyed instructions in the hauling of guests and such fact or facts were known to appellants or either of them, or if they could have determined such by ordinary diligence "then the said defendants in this case could not avail themselves of the defense that the said Rulon D. Hair was acting contrary to instructions and outside the scope of his authority in hauling a guest, or in not attending to company business." The effect of this instruction was to simply tell the jury that if Hair disobeyed his instructions at any time—even once—and the appellants knew or could have known of it, then they could not contend that Hair was acting outside the scope of his authority or was "not attending to company business." An objection was taken to such instruction on the ground that it was too limited in its effect and did not consider the necessity that before such a restriction in the hauling of guests could be waived, the same must have been notorious and that an occasional breach could not be considered a waiver of this

right. The Court entirely overlooked that part of the law which has heretofore been discussed in this brief. The instruction was not cleared up in any other instruction and, it is urged, gave the jury the right to find against appellants on this point if Hair had at any time violated his instruction not to haul guests.

By the instruction quoted in Error XX, the Court advised the jury that if they found the death of Avenell Newby resulted from Hair's intoxication or reckless disregard of the rights of others and that either was the proximate cause of her death, the verdict should be for plaintiffs, if they should find for plaintiffs on other issues. In the first place, the complaint does not charge Hair with intoxication. It will be observed that the instruction fails to distinguish between the rights of Hair and those of appellants, but on the contrary simply advises the jury that if they find against Hair, they must find against appellants.

For the reasons heretofore recited, each instruction given and excepted to was erroneous and appellants most earnestly urge they were prejudicial.

#### **B. Error In Refusing Requested Instructions.**

In the requested instruction quoted in Error XXI, appellants sought to have the jury advised that a high rate of speed was not in and of itself reckless disregard of the rights of a guest. This instruction was refused. Its purpose was to overcome, if possible, the effect of the instruction heretofore complained of to the effect that speed in excess of thirty-five miles per hour was unlawful in a case of this character. Speed alone



is not evidence of either intoxication of the driver or willful disregard of the rights of others. See: *Holmes vs. Wesler* (Mich.), 265 N. W. 492. Appellants were entitled to have said instruction given in order to clear up this point.

Appellants also requested the Court to give that certain instruction quoted in Error XXII to the effect that if the jury believed from a preponderance of the evidence that Hair was forbidden to permit a guest to ride with him in the panel truck and "if you find this instruction was in full force and effect on the 11th day of September, 1942" but nevertheless he did haul Avenell Newby as his guest, they must find that he was not acting within the scope of his employment. Such expresses the law applicable to this case and the evidence adduced as is clearly apparent from such cases as:

*Chajnaclsi vs. Dougherty* (Mich.) 236 N. W. 789;  
*Albers vs. Shell Oil Co.* (Cal.) 286 Pac. 752;  
*Hartingan vs. Public Ledger* (Pa.) 140 Atl. 524;  
*Saltas vs. Affleck* (Utah) 102 Pac. (2d) 493.

Appellants requested the Court to give the instruction quoted in Error XXIII to the effect that while there is a presumption that the driver of an automobile is the owner's agent, this presumption is rebuttable and if they should find that Hair, at the time of the accident, was using the automobile for his personal business or pleasure and not in the furtherance of the business of Donnelly or the Company, then the latter would not be liable for his misconduct. This instruction was particularly necessary because the jury had been instructed that the driver was presumed to be the owner's agent with no qualifications given nor advise that such presumption could

be overcome. It is not an answer to the failure to give this instruction that appellants were sought to be held upon another theory, because such theory failed of proof. The matters contained in this requested instruction were necessary to enable the jury to understand the fact that the driver could act outside the scope of his employment.

By the requested instruction quoted in Error XXIV, appellants sought to have the jury advised that if they found the prime objective of Rulon D. Hair was to take Avenell Newby to her home at the time the accident occurred, the fact that there might have been property in the truck prepared by the Tobacco Company would make no difference. This requested instruction was for the purpose of advising the jury that Hair could step outside the scope of his employment even though there were company products in the truck.

See: *Allen vs. Ross* (Ark.) 138 S. W. (2d) 409.

By the instruction quoted in Error XXV, appellants requested the Court to advise the jury in effect that if Avenell Newby joined with Hair in drinking intoxicating liquors and the two of them were riding in the car under the influence of liquor, she assumed the risk of any danger or damage that might result therefrom and was contributorily negligent. There was evidence that both had imbibed intoxicating liquor (R. 317, 321). This instruction should have been given under such cases as *French vs. Tibben*, 53 Ida. 701, 27 P. (2d) 475; *House vs. Schrncler* (Cal.) 40 P. (2d) 577.

By the instruction quoted in Error XXVI, appellants sought to have the jury advised that a gratuitous guest or his

heirs could not recover for an automobile accident if, conscious of apparent danger or faced with such circumstances as would herald danger to a reasonably prudent man, he nevertheless failed opportunely to protest and that if they believed Avenell Newby, acting as a prudent person, should have known that Rulon D. Hair was driving said automobile in reckless disregard of her rights or that he was intoxicated, nevertheless failed to protest or give him timely warning, there could be no recovery by appellees. The evidence is clear to the effect that she made no protests to the manner in which Hair was driving, although she was in a position where she could have done so if he were conducting himself improperly (R. 301). Under such circumstances, the rule announced in *Dale vs. Jaeger*, 44 Ida. 576, 258 Pac. 1081 and *Dillon vs. Brooks*, 51 Ida. 510, 68 P. (2d) 851 required the giving of such instruction.

Appellants requested the Court to give the instruction quoted in Error XXVII advising the jury what evidence would be necessary before they could find appellants liable upon the theory that Hair was a reckless and incompetent driver. By its refusal to give this instruction the Court took from the jury one of the fundamental theories advanced by the appellants and a theory which is supported and sustained in such cases as: *Guedon vs. Rooney* (Ore.) 87 Pac. (2d) 209, and *Pittsburgh Rwy. Co. vs. Thomas*, 174 Fed. 501. The same argument likewise applies to the Court's refusal to give those instructions requested by appellants and quoted in Errors XXVIII and XXIX. This theory of the appellants was vital in their defense and they had a right to have the jury advised of the law controlling such a situation.

Upon the whole, appellants submit that their defense was not fully and fairly presented to the jury and that the Court erred in each instance wherein complaint is made with reference to instructions.

### CONCLUSION

In conclusion, therefore, appellants most respectfully urge that the learned Trial Court erred in the particulars hereinbefore recited and that the judgment entered against appellants cannot stand but that such judgment should be reversed with directions to dismiss said cause against appellants.

Respectfully submitted,

E. B. SMITH

Residence and Post Office Address  
Boise, Idaho

A. L. MERRILL

R. D. MERRILL

Residence and Post Office Address  
Pocatello, Idaho





**APPENDIX "1"****Section 48-901 Idaho Code Annotated****As Amended by Chapter 160 of the****1939 Session Laws**

48-901. LIABILITY OF MOTOR OWNER TO GUEST. No person transported by the owner or operator of a motor vehicle as his guest without payment for such transportation shall have a cause for damages against such owner or operator for injuries, death or loss, in case of accident, unless such accident shall have been intentional on the part of the said owner or operator or caused by his \* \* *intoxication* or his reckless disregard of the rights of others.

**APPENDIX "2"****Plaintiffs' Exhibit No. 22**

Probate Docket. Case 258. State of Idaho, Plaintiff, vs. B. R. Hair, Defendant.

In the Probate Court of Clark County, State of Idaho. Before Honorable William A. Patt, Probate Judge. Be it remembered that on this 19th day of July 1939. Complaint in writing on oath of Sid Close, Sheriff was filed, alleging that B. R. Hair of Soda Springs, Idaho, on or about the 19th day of July 1939 at Dubois in the County of Clark, State of Idaho, then and there being did then and there commit a misdemeanor, to-wit: by driving a motor vehicle on the public highway in a reckless manner. 18th day of July 1939, Warrant issued and delivered to Sid Close, Sheriff, for service. 19th day of July 1939 warrant returned. 19th day of July 1939, Defendant in Court, complaint read, and to said complaint he entered a

plea of guilty. Case set for trial 10 o'clock A. M. Defendant fined \$50.00 and \$5.00 court costs. \$55.00 fine and court costs paid. The defendant discharged. William A. Patt, Probate Judge. 19, subpoena issued for\_\_\_\_\_ witness on the part of the prosecution, delivered to\_\_\_\_\_ for service \_\_\_\_\_ 19 , Supoena returned, served on\_\_\_\_\_ 19 , Jury\_\_\_\_\_ by\_\_\_\_\_ and venire issued to\_\_\_\_\_ for service, returnable\_\_\_\_\_ 19 , at\_\_\_\_\_ o'clock M. Attroneys, John Black, Pocatello, Idaho for Plaintiff \_\_\_\_\_ for defendant.

Costs, Officers' costs \$3.00 Sheriff fee \$2.00 total \$5.00  
 Witness fees, --Pliff. Total Witness fees—Deft. Total Jurors' fees. Total. Total fees.

State of Idaho,  
 County of Clark—ss.

I, J. N. Hoppes, Probate Judge of the Probate Court, in and for Clark County, State of Idaho, do hereby certify that the above and foregoing is a full, true and correct copy of the judgment docket in the case of the State of Idaho, vs. B. R. Hair, as appears from the Book 1 Probate Dockets Criminal, Clark County, page 258, and that the Judgment Docket from which said copy was made is the official criminal docket of the Probate Court of Clark County, State of Idaho.

In Testimony Whereof, I the said Probate Judge have hereunto set my hand and affixed the seal of said Court this 8th day of October, 1943.

(Seal Probate Court) J. N. Hoops, Probate Judge.

IN THE  
United States  
Circuit Court of Appeals

For the Ninth Circuit

---

R. J. REYNOLDS TOBACCO COMPANY  
and L. R. DONNELLY, Appellants,

vs.

GEORGE H. NEWBY, in his own behalf, RICHARD  
ARLEN NEWBY and PATTY ANN NEWBY, both  
minors, by their Guardian ad litem, George H.  
Newby, Appellees.

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BRIEF OF APPELLEES

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On Appeal from the District Court of the United  
States for the District of Idaho, Eastern Division.

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FILED

JUL 17 1944

PAUL P. O'BRIEN,  
CLERK

GLENN A. COUGHLAN,  
Residence: Montpelier, Idaho.

B. W. DAVIS,  
Residence: Pocatello, Idaho,  
Attorneys for Appellees.

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**No. 10708**

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**On Appeal from the District Court of the United  
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**GLENN A. COUGHLAN,  
Residence: Montpelier, Idaho.**

**B. W. DAVIS,  
Residence: Pocatello, Idaho,  
Attorneys for Appellees.**





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**BRIEF OF APPELLEES**

---

On Appeal from the District Court of the United  
States for the District of Idaho, Eastern Division.

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**APPELLEES' STATEMENT OF CASE**

Counsel for Appellees feel that a further statement  
of the case will be of assistance in presenting a clearer  
picture of the controversy.

Appellants' statement of the pleadings and the na-  
ture of the action are not controverted.

Naturally some of the facts are in dispute and the  
facts herein referred to are facts that are supported

by evidence that the jury was entitled to believe if they desired.

One of the defendants, Rulon D. Hair, who was the driver of the truck at the time of the unfortunate death of young Mrs. Newby, had some time previously, while in the employ of the Reynolds Tobacco Co., and while under the direct supervision of L. R. Donnelly, while hauling a guest and acting contrary to instructions when using a panel truck belonging to Donnelly and the Tobacco Company, killed one Jacob Myers in the City of Pocatello on the morning of April 15, 1939 in the early morning hours of that date. Testimony of officers Smullen and Buskirk (R) 222 to 235. As a result of this accident, and unfortunate killing, the same defendants were sued in an action instituted as a result of the claimed negligence of Mr. Hair. Also, Mr. Hair was convicted of involuntary manslaughter for the death of Myers in Pocatello. Mr. L. R. Donnelly came to Pocatello for the purpose of investigating the accident in which Myers lost his life and at that time sent newspaper clippings back to Mr. Darr, an officer of the Reynolds Tobacco Company and also corresponded with Mr. Darr and Mr. Roe by telegraph and by letter. Later, Mr. Donnelly was present at and attended the trial of the case in District Court when Mr. Hair was convicted. Mr. Donnelly sent a full report to E. A. Darr (R) 255, in which he enclosed a newspaper clipping of the accident and stated that the clipping was all wrong in playing up the accident. He gave his version of the accident but did not report to the company that Mr. Eckersley was a guest in the panel truck at the time, or that Hair had been at the El Rio Night Club with the truck.



Mr. Roe, by telegraph, communicated with Mr. Darr, advising that Hair was out on bond and because of his sales ability, Donnelly regretted to lose him. (R) 261. Mr. Darr confirmed Mr. Roe's telegram and wired him as follows:

"Since Hair was using the company car on personal business our disposition is to get his resignation. However, willing approve your recommendation as to continuing him provided he agrees to pay full cost of repairs to company car." (R) 261.

After discussing the matter with Hair, Mr. Donnelly continued to permit him to work for the company and to operate their truck, warning him that he must not again violate instructions. Within a very short time, namely on July 22, 1939, Hair, under the name of B. R. Hair, pleaded guilty to reckless driving in Dubois, Clark County, Idaho and was fined \$50.00. At the time he was driving a panel truck belonging to the Reynolds Tobacco Co., and was operating in his territory. Thereafter, according to Mr. Hair's testimony, he violated the instructions of the company several times in hauling guests and later on, hauling Avenell Newby and she was also killed. The only testimony as to the circumstances of the hauling of Avenell Newby naturally is the testimony of Hair. However, Hair freely admitted that he had made statements that were not the fact that he had failed to tell the company the truth; that he first signed a report that he was on company business when Avenell Newby was killed and that he had no passengers. He then signed a corrected report stating that he was on company business but had a

passenger. Both of the reports are in evidence and are referred to in the deposition of Mr. Darr. (R) 268, Exhibit 12-13.

At the time of the injury to Avenell Newby, Mr. Donnelly had hurried to Montpelier, Idaho to investigate the accident and to take charge of the truck and the contents of the same. At that time he had a conversation with George H. Newby, the plaintiff, in which Mr. Donnelly told him that he had gotten Mr. Hair out of these scrapes before and that there would be no reason to bring suit against Hair. (R) 177. Also, that he, Donnelly, had talked to Hair and that it was just an innocent ride. (R) 177. At about the same time, Mr. Donnelly had a conversation with Russell and Calvin Teuscher, brothers of Avenell Newby. He said to Hair in the presence of Russell Teuscher:

“Good God, did you have a woman with you again, I didn’t know that.” (R) 237.

Also, he told Russell Teuscher,

“That he had trouble with this young man before.” (R) 238.

In a conversation with Calvin Teuscher, Mr. Donnelly stated:

“For God’s sakes, were you with another woman?” (R) 243.

Also, he told Calvin Teuscher,

“That he had warned Hair before.” (R) 244-245.

The evidence as to the accident is contained in the testimony of the witness, Mike Maguire, Mr. Bunderston, the sheriff of Bear Lake County, Idaho, and Mr. Hair himself. Mike Maguire, an assistant road master for the Union Pacific Railroad Company, testified that the truck driven by Hair passed him some eight or ten miles before the accident, going at a speed of around 60 miles per hour; that as he proceeded on down the road, he came to the scene of the accident and that when asking Mr. Hair as to the cause Hair stated:

“He said he just was drinking and driving too fast.” (R) 101.

This witness' testimony was positively to the effect that he never met a motor vehicle of any kind or description from the time Hair passed him with the panel truck until he came to the scene of the accident. Mr. Hair's explanation of the accident was that a truck going in the opposite direction, and which would have been bound to meet Mr. Maguire, had forced him off the road.

The testimony of Mr. Bunderston, the sheriff (R) 112 to 158, recites in detail the measurement of the tracks of the company truck, the condition of the road bed and surrounding conditions. The truck tipped over on a straight stretch of road where there were no obstructions to the view either way from where the accident happened, for at least one-fourth of a mile. Measurements were made with a steel tape and a diagram made by the sheriff at the time, and showed that the tracks of the truck driven by Hair left the oiled high-

way on the west side, staying off for 117 feet; that they then stayed off the oil on the east side of the road 166 feet; that they then came back on the oil and went across it again for 146 feet; that they then took off the oil again for 66 feet and then went east across the oil 92 feet to the east side of the barrow pit and from there went 124 feet before it stopped and turned over. (R) 115. The car travelled 888 feet, or 296 yards, from the time it first left the oiled highway.

The testimony of Mr. Hair is to the effect that he was forced off the road by a large truck; that upon being forced off, the right front tire struck a rock causing a blow out and that his course from that time on was caused by reason of the blow out, which occurred at a time when he was going approximately 35 miles per hour. The tire on the truck never came off; the picture of the truck taken, shows all four tires on it. There was a blow out of this tire with a small slit and some of the rubber from the tube sticking out.

Mr. Oxenbine, a witness for the defendant (R) 334-338, an automobile mechanic, testified that the tire was mounted on a drop center rim and that the tire would not stay on the rim very long if the car was swerving badly.

Mr. Donnelly denied the testimony of Mr. Newby and the Teuscher boys, that he made the statements concerning his knowledge of Hair's prior acts. Hair denied any reckless driving whatever, claimed to be a competent and experienced driver.

Mr. Hair was uncorroborated in his statement concerning the length of time that Avenell Newby was with him.

### SUMMARY OF APPELLEES' POSITION

While numerous technical objections were made to the pleadings, the introduction of evidence, the instructions and to almost every step that the appellees took, nevertheless, the case does not present any extraordinary complicated law questions or any serious question as to the main facts.

The appellees recognized and proceeded at all times upon the theory that they were bound by the guest statute of the State of Idaho; that it was necessary to prove that at the time of the accident, Hair was acting with a reckless disregard for the rights and life of Avenell Newby, as defined by the guest statute and by the Supreme Court of the State of Idaho. The appellees recognized and now recognize that it was incumbent upon them to prove that Hair was acting in the scope of his authority upon company business and that either the company consented to his hauling guests or that the company had such knowledge of his previous acts and record that they were bound by such acts and record and that it was necessary for the appellees to either introduce direct evidence upon these matters or such evidence as would justify reasonable men to find that either the appellants knew that Hair was a reckless incompetent driver and that he hauled guests or that they could have so known by the use of reasonable and ordinary diligence.



The case does not present any element of simple negligence as distinguished from reckless disregard or gross negligence. The plaintiff never contended that the proof of former acts of Hair's or proof of the knowledge of those acts by the appellants, was sufficient to entitle appellees to a verdict or that they could recover against anyone unless Hair, at the time of the accident, was acting with a reckless disregard of the rights of the deceased.

Appellants complain that evidence of the former acts of Hair were prejudicial and that not being admissible as to Hair and the Court having so ruled, that this evidence should have been excluded altogether. This argument is merely confusing. In any case where the master is joined with the servant, it takes evidence that would not be admissible against the servant alone, to prove the agency and that the servant is acting in the course of his employment in order to hold the master. If the present action was against Mr. Hair, the servant alone, the appellees would not be entitled to put in proof that the truck that Hair had, contained products of the Reynolds Tobacco Co.; that it was customary for Hair to sell those products; that the name of the Reynolds Tobacco Co. was painted on the car or that he was in the territory that he ordinarily sells goods in, because as to Hair, that makes no difference and could make no difference to the appellees and the evidence would be inadmissible. However, as to the master, if the negligence of Hair, or his careless conduct is proven, the evidence becomes admissible to show whether or not he was acting in the scope of his authority. The same situation arises when it is

sought to show that the master knew that the servant was a reckless and incompetent driver. The evidence as to his recklessness and incompetence is admissible on exactly the same theory as the evidence to show that he was acting within the scope of his employment when of course, Hair's liability does not depend at all on whether he was within the scope of his employment or whether he was a reckless driver. However, if the master knew he customarily acted as he did and that he acted within the scope of his authority, then the master is liable. Also, if the master knew he was a reckless incompetent driver, then the master and Hair should stand in the same shoes, and it is not necessary to prove that Hair was acting within the scope of his authority, because the master waived that proof when he permitted a reckless incompetent driver to operate the car.

The killing of a person is a serious and lamentable thing. The defendants take the position that the Myers incident, as they refer to it, was not sufficient to put the appellants on their guard and was not sufficient to advise them Hair was reckless or that he hauled guests contrary to instructions. The District Manager, Mr. Donnelly, took the position at the time that the newspapers in reporting the incident, and the police in arresting Hair and in holding his truck, were acting in an unwarranted manner. He thought Mr. Hair was too good a salesman to lose and he and Mr. Roe convinced the treasurer of the company, Mr. Darr, that they should allow Hair to continue and thereafter in July of the same year, when Hair had a woman as a guest, the woman not being his wife, in Clark County,

Idaho, a place within his own territory and a place under the direct supervision of Donnelly, he pleaded guilty to reckless driving while driving a company truck. This was before his trial. True, he gave his initials as B. R. Hair, but certainly the appellants having known of his using the truck to visit night clubs and of hauling Mr. Eckersley at the time he killed Meyers, were under some obligation to ascertain whether or not he was complying with their instructions. If appellants' position is correct an employer or owner of an automobile can shut his eyes to any course of action that his driver may follow and unless he is told explicitly and directly of specific acts of negligence, he cannot be charged with any responsibility whatever.

The appellants placed Hair in the exclusive control of the panel truck. Appellees take the position that the rule of law with reference to the liability of the owner of a motor vehicle is more strict where it is placed in the exclusive control of the servant than otherwise, and also take the position that it is the duty of concerns such as the Reynolds Tobacco Co. to employ competent, careful, law abiding drivers. They are not permitted to absolutely ignore the facts in connection with their drivers. The treasurer of the company, Mr. Darr, testified he had never seen Hair and that was undoubtedly the reason for appointing a District Manager to supervise these drivers.

Then the Reynolds Tobacco Co. had been sued in a civil suit for Hair's recklessness and when they knew that he had been convicted, it does not seem they could consider these facts as incidents of so little importance

that it was not necessary for Mr. Donnelly, who had charge of Hair's territory, to follow the matter up. They preferred to take their chances on Mr. Hair, and unfortunately it resulted in another death.

## ARGUMENT

Appellees in their argument, will discuss the facts and the law deemed applicable under the following heads:

- I. Does the complaint state a cause of action and was it subject to the motions of appellants?
- II. The facts are sufficient to support the verdict.
- III. A master who retains in his employ, a reckless or incompetent driver, is liable for the recklessness or incompetency of said driver. Likewise, a master who permits a driver to haul guests contrary to instructions, cannot claim lack of knowledge, or violation of instructions.
- IV. Instructions to the jury.

### I.

#### DOES THE COMPLAINT STATE A CAUSE OF ACTION AND WAS IT SUBJECT TO THE MOTIONS OF APPELLANTS?

The complaint stated a cause of action under the rules of Federal Procedure for District Courts and the appellants and Hair were in possession of all the facts with reference to the driving, with reference to the

ownership of the car and with reference to the circumstances. The testimony indicated clearly they were not surprised in any respect. Mr. Darr's deposition was taken at their instance; his cross examination indicated clearly the theory of the appellees; interrogatories were submitted by both sides and the appellants were not injured by the amendment of the complaint but were fully advised as to what appellees contended.

Manion v. Waybright, 59 Ida. 634, 86 Pac. 2d 181;

Dawson v. Salt Lake Hardware Co., (Ida.) 136 Pac. 2d 733;

Hollander vs Davis 120 Fed. 2d 131;

Sierocinski v. E. I. DuPont deNemours Co., 103 Fed. 2d 843;

Hardin v. Interstate Motor Freight System, 26 Fed. Supp. 97;

Department of Water & Power of the City of Los Angeles v. Anderson, 95 Fed. 2d 577;

Thayer v. Reindl, 1 F.R.D. 528;

George v. Stanfield, 33 Fed. Supp. 486;

Rocca v. Steinmetz et al, 214 Pac. 258;

Mitchell v. Churches, 206 Pac. 8;

Lutfy v. Lockhart, 295 Pac. 976;

Southern Pacific v. Hetzer, 135 Fed. 276.



Rule 8a (Subdivision 2), Rules of Civil Procedure for the District Courts of the United States, is as follows:

“A pleading which sets forth a claim for relief, whether an original claim \* \* \* which contains a short and plain statement of the claim, showing that the pleader is entitled to relief and a demand for judgment for the relief to which he deems himself entitled.”

Rule 15 of the Rules of Civil Procedure for the District Courts of the United States (Subdivision a), dealing with amendment by leave of Court is as follows:

“Otherwise a party may amend his pleading only by leave of Court or by written consent of the adverse party; and leave shall be freely given when justice so requires.”

Complaint is made that the appellees were not required to elect. This is certainly not a very serious objection. There was never any question of simple negligence in the case and appellant does not attempt to define simple negligence. Federal Courts have given up trying to distinguish between degrees of negligence. However, regardless of degrees of negligence, the jury was only instructed under the guest statute and on the question of a reckless disregard as provided by the statute.

Appellants insist that there is something peculiar about the Idaho guest statute and that the amendment of the statute deleting the words “gross negligence” requires some special form of pleading and that the

rule of law laid down by the Idaho Supreme Court in the case of *Manion v. Waybright* supra, has been abrogated by the amendment. That the Idaho Courts do not support appellants' view is shown by the language of the Court in *Dawson v. Salt Lake Hardware Company*, supra, the Court saying:

"Where, however, the word is used with reference to the driver of a guest car, in relation to the guest himself in the car, it can hardly be said that 'reckless' includes **wilful, intentional** or **done on purpose**. If so intended, there would have been no reason for retention of the word 'reckless'; nor would the legislature have deleted from the statute the words, 'gross negligence' by the 1939 amendment. (Sec. 48-901, I.C.A. as amended, '39 S.L., Chap. 160, P. 286.) It is evident, to my mind, that the legislature by the use of the word 'reckless' following the word 'intentional' meant to hold the driver liable for a lesser degree of negligence than an 'intentional' act. A driver may accomplish the same result, however, by driving in a **manner** or at a **speed** that is dangerous (reckless), and yet do so with no special purpose to injury his guest or himself, or intent other than to be going wherever and however he pleases, regardless of results. The word 'reckless,' as used in this statute (Sec. 48-901, I.C.A., as amended by Chap. 160 of the '39 Sess. Laws), is, in my opinion, not used as synonymous with 'conscious indifference,' 'wilful disregard,' or 'wanton disregard' of the rights of a guest. Ordway, on Synonyms and Antonyms, gives the synonyms and antonyms of the word 'reckless' as follows:

**'Mindless, negligent, thoughtless, regardless, unconcerned, inattentive,** remis, improvident, rash, inconsiderate.

‘Ant. Circumspect, careful, wary, **thoughtful, mindful, attentive, considerate,** provident, prudent, **calculating.**’ (Boldface inserted.)

“It will be observed that none of the foregoing carries the thought of reckless necessarily being intentional or purposely; but each rather conveys the idea of being the contrary, without thought or care for consequences, as indicated by the antonyms enumerated.”

How can it be said that a cause of action could have been stated under the guest statute against Waybright, the owner and defendant in the Waybright case, for gross negligence, and that a cause of action could not have been stated against him for a reckless disregard for the rights of others.

It is settled that the Federal Court is bound by the law of Idaho and that it will follow the substantive law of the State in which the accident occurred. Consequently the Waybright case, being the law of Idaho, it is applicable in its construction of the guest statute. What difference can it possibly make that the statute has been amended by inserting “reckless disregard” instead of “gross negligence”? The contention is answered in *Dawson et al v. Salt Lake Hardware Co.*, supra.

The appellants object that the complaint did not charge directly that Hair was a reckless driver and that they were prejudiced thereby. In other words, the objection is that the complaint does not allege that Hair was a careless, reckless and incompetent driver

and the defendants knew it, but they say that the complaint alleges, which it does, that the appellants knew that Hair was a careless, reckless and incompetent driver. All this is a bandying of words. The complaint actually alleges that Hair had the permission and authority of the defendants to use and operate the truck upon the highways, notwithstanding that at all of said times, the said Tobacco Company and Donnelly knew that Rulon D. Hair was a careless, reckless and incompetent driver of an automobile and was in the habit of hauling guests contrary to instructions. Certainly the allegation that the appellants knew Hair was in the habit of hauling guests contrary to instructions is concise and plain enough for the Court and the litigants to understand.

## II.

### THE FACTS ARE SUFFICIENT TO SUPPORT THE VERDICT.

It is argued on appeal that the facts are not sufficient to support a verdict under the guest statute where it is necessary for the appellees to prove that the driver of the car acted with a reckless disregard for the right of the guest. That the jury was justified in finding that the driver so acted is amply supported by the record. The evidence clearly supports the verdict. The testimony of the witness Maguire that he did not meet any semi-trailer or any other motor vehicle from the time Hair passed him until he, Maguire, came to the scene of the accident, left it to the jury to believe or disbelieve Hair's story of being forced from the road and blowing out a tire.

Furthermore, when Mr. Hair reported the accident to Durwood Perkins, the appellants' witness (R) 358, he did not give any history of having been crowded off the road by a truck and semi-trailer, but made the following statement:

"A. I did not know there had been an accident. Mr. Hair told me himself he had rolled his truck over; I did not know at the time Avenell Newby was with him, but he told me himself that he rolled his truck over."

Mr. Bunderston's testimony was to the effect that Hair did not tell him of any semi-trailer crowding him from the road and that he did not find any rock that Hair struck, such as was likely to blow a tire. An intimation was made by questions of the appellants' counsel, that there might be side roads where this truck could have left the highway and avoided meeting Mr. Maguire who was following closely behind. The jury had a right to take into consideration its own knowledge, if it had any, of the road in the vicinity and also the probability or likelihood of this large semi-trailer having pulled onto a side road when the shoulders of the road were muddy, without leaving such tell-tale marks that it would have been easy for the appellants to have offered direct proof. In addition, the members of the jury, some of whom lived in the immediate vicinity, could not have helped but know the general character of the country on each side of this road between Soda Springs and Montpelier and between the points where Hair could have been forced from the road and where Maguire's automobile would have been bound to be and they were entirely justified in disbelieving Hair's



story if it was not impressive.

Some credit must be given to the jurors for knowledge as to distances between Soda Springs and Montpelier; Soda Springs and Grace; Pocatello and Dubois, and the road conditions and whether or not there are any side roads in the immediate vicinity of where the accident happened. An examination of the jurors on their voir dire showed that one juror, Mrs. Kelly lived in Soda Springs; one juror, Mr. Creer, an old time resident, lived near Soda Springs; that the jurors, Garretson and Robinett lived at Dubois in Clark County.

The jury also as practical individuals were entitled to consider the time it would have taken the truck that crowded Hair from the road, to meet Mr. Maguire. Also, the longer time it took Mr. Maguire to arrive at the scene of the accident, the greater must have been the speed of the driver, Hair.

The measurements taken by the sheriff showing the course of the car and the distance it travelled, justifies any person of ordinary knowledge of automobiles and driving, in believing that the truck driven at a tremendous speed, went out of control and careened back and forth across the highway until it left the road. Certainly a truck going 35 miles per hour should not travel 300 yards before it is brought under control. Mr. Hair's description of the blown out tire, the size of the cut in it, and its general appearance, belies any claim that it could have blown out when he first left the oil surface of the road. A drop center tire carrying a load such as this truck carried, not only would not

have stayed on the wheel for 300 yards, but it would have been literally torn to shreds. The jury was justified in believing that the tire blew out when it finally hit the barrow pit and turned over. Certainly under the instructions of the Court, Mr. Hair's testimony, where it was not corroborated, was entitled to be scrutinized and even disbelieved by the jury if it was not convincing. The jury had an opportunity to see the different witnesses. Mr. Maguire and Mr. Bunderson were certainly entirely unprejudiced and unimpeached. The witness Hair, did not deny the statement attributed to him by the witness Maguire.

In the case of *George v. Stanfield*, 33 Fed. Supp. 486, Judge Cavanah, District Judge for Idaho, in construing the Oregon Automobile Guest statute, said:

"The operation of an automobile at excessive speed without regard for the rights of others, when approaching a short curve upon a slippery highway, without brakes, is recklessness within the Oregon Automobile Guest Statute."

The Oregon code is identical with the present Idaho guest statute with reference to reckless disregard of the rights of others.

"The physical facts, however, speak more forcibly than the words of the witness. There is no dispute or explanation of the positive testimony that defendant's car skidded 120 feet on the dry, concrete pavement, and 20 feet further on the gravel shoulder and collided with plaintiff's car with sufficient momentum to cause the damage complained of. There is no evidence in the record as to the speed indicated by such a situation, but

we think it is a matter of common, if not universal, knowledge that it discloses a rate far in excess of 40 miles per hour, and that a jury would be justified in so concluding. In fact, under the circumstances of the instant case, we are of the view that the jury might well have concluded that defendant's speed was such as to be dangerous and reckless. In this connection it is pertinent to observe that according to the defendant's testimony, he travelled continuously on the east side of the concrete without seeing or passing another car. The record discloses, however, to a certainty we think, that he passed the Werner car a short distance south of the intersection. We conclude that the finding of negligent speed is amply supported. *Meissner v. Papas*, 124 F. 2d 723";

*Brock v. Waldron*, 14 A. 2d 715;

*Lionetti v. Coppola*, (Conn.) 161 Atl. 797;

*Bordonaro v. Senk*, (Conn.) 147 Atl. 136;

See also notes in 92 A.L.R. 1367; 96 A.L.R. 1479; 86 A.L.R. 1145.

It was not necessary for the appellees to prove an intentional act on the part of Hair or that he was wanton and wilful. In *Mescher v. Brogon*, (Ia.) 227 N.W. 645, the Iowa statute is very similar to Idaho and the citation is also in point as to the case being one for the jury. See *Cleveland C.C. & St. L. Ry. Co. v. Loret*, 68 Fed. 823. The case of *Dawson et al v. Salt Lake Hardware Co.*, *supra*, is ample authority for the contention that the question of whether the driver acted with a reckless disregard in the instant case was one to be determined by the jury and it is not believed

that it would be helpful in the presentation of this matter to cite the numerous authorities in automobile cases holding that the question of negligence where the mind of reasonable men may differ, is for the jury.

Appellants overlook the fact that while one may be negligent without being reckless, nevertheless, one who is reckless is bound to be negligent.

The Federal Courts do not attempt to draw distinction between degrees of negligence as the State Courts have attempted to do.

N.Y.C.R.R. Co. v. Lockwood, 17 Wall. 357,  
382, 21 L. Ed. 627;

Connelly v. So. Pac. Ry. Co., 111 Pac. 2d 463;

The question of whether or not Hair was on company business and whether or not Donnelly and the Reynolds Tobacco Co. had knowledge that he was in the habit of hauling guests or was a reckless driver, was for the jury.

As appellees view the matter, there is ample evidence to support the verdict regardless of the question of whether or not the appellants knew he was a reckless driver. Exhibits 12 and 13, (R) 203 are reports made on blanks furnished by the company to be filled in when the drivers have accidents. Exhibit 12 stated in answer to question 15 thereon, that Hair was on company business. He then made a corrected report in which he made exactly the same answer to the same question. The testimony of Mr. Donnelly (R) 202, was

that he either inspected Exhibits 12 and 13 or at least one of them:

“Q. Did you see Mr. Hair make them out?

“A. I saw him make one copy.

“Q. You looked them over when he made them out?

“A. I looked it over I guess.

“Q. Where did you see him make it out?

“A. In the Chief of Police Office at Montpelier, Idaho, as I recall it.”

Mr. Donnelly's report to his superior, Mr. Darr at the time of the injury of Avenell Newby, stated:

“A married woman passenger whom Mr. Hair had picked up was severely injured and was in need of immediate medical attention.” (R) 267.

Mr. Donnelly told the witness Newby:

“That he had talked to Mr. Hair and he said as far as he could tell, it was just an innocent ride.” (R) 177.

Mr. Hair was in his territory during business hours and was hauling the products of his company in the customary manner and regardless of whether his employer knew he was a reckless driver, the jury was justified in believing he was on company business. The appellees do not believe Mr. Hair's story that Mrs. Newby had been with him all night. Such a statement is absolutely unsupported by any evidence except of Hair. He certainly told Donnelly it was an innocent



ride and the testimony was for the jury on this phase of the matter.

### III.

A MASTER WHO RETAINS IN HIS EMPLOY, A RECKLESS OR INCOMPETENT DRIVER, IS LIABLE FOR THE RECKLESSNESS OR INCOMPETENCY OF SAID DRIVER. LIKEWISE, A MASTER WHO PERMITS A DRIVER TO HAUL GUESTS CONTRARY TO INSTRUCTIONS, CANNOT CLAIM LACK OF KNOWLEDGE OR VIOLATION OF INSTRUCTIONS.

Mr. Donnelly was the District Manager and according to Mr. Darr's testimony, in full charge of Hair and the man to whom Hair made his report. There was ample evidence to justify the jury in believing that Mr. Donnelly knew of Mr. Hair violating company instructions with reference to hauling guests and also that by the use of ordinary diligence, he could easily have been advised of repeated violations of company instructions. It appears clearly from the record in Mr. Donnelly's report to his superiors, that he was trying to shield Hair. In Mr. Donnelly's report of the accident at Pocatello, in which Mr. Myers was killed, after investigating the accident, after being in the town where the police officers were, and calling on them (R) 204; after Hair was arrested and out on bond and when he could not have but known that Mr. Hair was not returning from taking his wife to the depot when he struck Myers. He, nevertheless, reported to Mr. Darr to the effect that Mr. Hair did not have a passenger contrary to instructions and that Hair was

returning from the train. The facts show that Mr. Eckersley was in the truck with Mr. Hair; that he was not returning from the train, but that he had been to the El Rio Night Club and that he was under the influence of liquor at the time he struck Myers. Also that he was driving recklessly and Mr. Donnelly testified that the jury recommended leniency for Mr. Hair.

Of course, Mr. Donnelly is bound by what he knew and of course the Tobacco Company is likewise charged with the knowledge of the District Manager. This requires no argument.

Mr. Donnelly testified that he covered his territory in Idaho once a month; that he imagined that Hair had a good record in Clark County as a driver. That Clark County was in his territory and that he tried to keep advised as to whether or not Hair was obeying instructions with reference to hauling guests. (R) 210-211. Either Mr. Donnelly did not try to keep advised in Clark County as to Mr. Hair's actions or record, or if he did try, he was bound to have ascertained that Hair had a bad record in that county and that he had disobeyed instructions and the appellants, having admitted full knowledge of the facts surrounding the death of Myers; having admitted that Mr. Donnelly attended Hair's trial; having admitted that they knew Hair was violating their instructions and Mr. Darr having advised that he felt Hair should be discharged but that he was willing to follow Donnelly's advice, cannot say that appellants were not under the obligation of at least keeping in touch with Hair's activity and surely cannot say that they were not under the

obligation of finding out that while operating in his own territory with the company truck, that he pleaded guilty to reckless driving in the Probate Court on the complaint of the sheriff of the county and was fined \$50.00. It is contended that Exhibit 22 was not admissible and that there was no notice to the appellants. Certainly the defendant Hair knew whether he was guilty of reckless driving and his own plea of guilty was as convincing as most anything could have been, of his recklessness. An investigation would have shown that at that time he had as a guest with him, a woman, not his wife. This is according to Mr. Hair's testimony.

The Courts hold that the master is liable for the retention or employment of an incompetent servant. In the first place, it is the duty of the master to employ competent servants to operate automobiles. In the second place, upon receiving information that a servant is incompetent, it is the duty of the employer to discharge the servant or to so circumscribe his activities that he will not injure others. This is especially true where his recklessness has resulted in the death of a person and where he has been convicted and where he has pleaded guilty to reckless driving.

“In these circumstances, it seems to us the duty of the Courts to indulge no subtle reasoning in extending the doctrine of non-liability to the owner of such an instrumentality who, in his search of gain and profit, places one of these in irresponsible hands, but rather to require of him such supervision of his servants as will avoid disobedience to and disregard of his rules, or, failing so to do, when injury occurs to a stranger, to shoulder the responsibility. Hence we are of the

opinion that whatever may be the rule in the case of a private chauffeur who, in violation of his master's orders, takes his private automobile and uses it without the master's knowledge and for the servant's purposes alone, or, in the case of one intrusted for the moment by its owner with an automobile for a specific purpose who, in disregard of that purpose, uses it for another, the rule in the case of one who, as a carrier of passengers for hire, places an automobile in the hands of a servant for the purpose of soliciting and obtaining fares and transporting them from one part of the city to another, and who, in such circumstances, admittedly would be liable to a pedestrian negligently injured by the servant, should reasonably be held to include liability for an injury inflicted by the negligence of the servant where that servant, in violating of the master's rules, is, as was here the case, transporting free a friend to her home near by. *Schweinhaut v. Flaherty*, 49 Fed. (2d) 535."

"The other question in the case calls for very little discussion. That question is whether the Court erred in submitting to the jury the issue as to the competency of Walter Wood, the driver of the truck in which appellee was being carried when he was injured. It is the duty of the master to use due care in the selection of competent servants. The retention of an incompetent servant after the master has had reasonable notice, either direct or constructive, of such incompetence, constitutes negligence on the part of the master; the master is chargeable with knowledge of the incompetency of the servant if by the exercise of due care he could have ascertained such incompetence. A master is liable for an injury received by an employee on the ground of negligence in employing or retaining an incompetent servant,

if such incompetency was the proximate cause of the injury." 39 C.J. Pps. 640, 641 pp. 533-535. Rainwater v. State, 120 So. 800.

"Employer in selecting employee, must exercise degree of care commensurate with nature and danger of business in which he is engaged and nature and grade of service for which servant is intended." 97 S.W. Rep. 2d 452. Wishbone v. Yellow Cab Co.

"In Raub v. Donn, 254 Pa. 203, 98 Atl. 861, the Supreme Court of Pennsylvania held that the Trial Court did not err in instructing the jury:

'It is the duty of a man to see that his automobile is not run by a careless, reckless person, but that it is in the hands of a skillful and competent person.' "

"In Gardner v. Solomon, 200 Ala. 115, 75 South, 623, L.R.A. 1917F, 380, it was declared that, while automobiles are not regarded as inherently dangerous instrumentalities, and the general rule is that the owner is not liable for the negligent use of the same by another, except upon the theory of respondeat superior, yet an exception exists when he knowingly intrusts it to one who is so incompetent as to convert it into a dangerous instrumentality. It also held therein that the allegation:

'That Thomas "was, and had long been, a careless, indifferent, heedless, and reckless driver of such car," was the equivalent of charging that he was incompetent.' " Rocca v. Steinmetz et al, 214 Pac. 259.



“In a case of a mere permissive use of an automobile, the liability of the owner should rest not only upon the fact of ownership, but upon the combined negligence of the owner and the driver; negligence of the owner in intrusting the machine to an incompetent driver, and of the driver in its operation.” *Mitchell et al v. Churches et al.* 206 Pac. 6.

“A habit of negligence that is known, or that by the exercise of reasonable care would have been known, to a master, and notorious acts of negligence, such as those which cause collisions of trains and the **death of passengers**, may render a servant incompetent, and impose upon the master the duty of discharging him.

“Specific acts of negligence of which the master has notice are conceded to be admissible to prove incompetenct, and a general reputation for incompetence is admissible to show that the master, by the exercise of ordinary care, would have known of the incompetence of the servant.”

*Southern Pacific Co. v. Hetzer*, 135 Fed. Rep. 276;

*Keyser Canning Co. v. Kots Throwing Co.*, 31 A.L.R. 283.

*Lutfy v. Lockhart*, 296 Pac. 976.

The case of *Department of Water and Power of the City of Los Angeles v. Anderson*, 95 Fed. (2d) 577, 9th Circuit Court of Appeals, is directly in point on the employment of a reckless or incompetent driver.

The case of *Manion v. Waybright* (Ida.), *supra*, is directly in point on the hauling of guests by the employee.

Black v. Coffin, 126 Pac. (2) 871;

School District 26 v. Baxter County Board of  
Education, 35 S.W. (2d) 1013.

#### IV.

#### INSTRUCTIONS TO THE JURY

Appellants complain that the jury was not instructed on contributory negligence. It is true they pleaded contributory negligence and assumption of risk, but the question of contributory negligence was not presented by the facts and they were not entitled to an instruction as a matter of law.

Contributory negligence is not a defense to an action based upon reckless disregard or gross and wanton negligence. The Supreme Court of the State of Idaho in Dawson v. Salt Lake Hardware, *supra*, clearly recognized the rule of law that contributory negligence is not a defense under the guest statute but in that case the parties on both sides, having proceeded upon the theory that it was a defense and having asked instructions upon it, the Court did not hold that it was error to give the instructions.

Connecticut and Iowa have guest statutes so nearly identical with that of Idaho, that the rule of law as to contributory negligence as laid down by the Supreme Courts of those two states, is applicable.

- Siesseger v. Puth, (Ia.) 239 N.W. 46;  
 Neessen v. Armstrong, (Ia.) 239 N.W. 56;  
 Shenkle v. Mains, (Ia.) 247 N.W. 635;  
 Lionetti v. Coppola, (Conn.) 161 Atl. 797;  
 Bordonaro v. Senk, (Conn.) 147 Atl. 136.

Contributory negligence is a defense to mere negligence, but the plaintiff must prove reckless disregard, which is more than mere negligence.

- Regan v. Keating et al, 42 N.E. 122;  
 Miesmer v. Dillon, 42 N.E. 2d 305;  
 Universal Pipe Co. v. Bassett, 200 N.E. 843,  
 119 A.L.R. 646;  
 Barnes v. Collins, 32 N.E. 2d 626, 138 A.L.R.  
 1123;  
 Potter v. Gilmore, 184 N.E. 373, 87 A.L.R.  
 1462;  
 Cochrane v. M. & M. Transportation Co., 110  
 Fed. 2d 519;  
 Haacke v. Lease, 41 N.E. 2d 590;  
 Johnson v. City of Alcoa, 145 S.W. 2d 796.

There are some cases holding that where the plaintiff is guilty of the same degree or kind of negligence or carelessness as the defendant is, that plaintiff cannot recover. However, the appellees in the instant

case did not charge Hair with negligent driving; they charged him with a reckless disregard for the rights of others and bottomed their case upon the guest statute. In order for the appellees to avail themselves of assumption of risk or any such doctrine, it would have been necessary for them to have proven that Avenell Newby was guilty of exactly the same kind of reckless disregard and that her injury was either intentional, caused by intoxication or by reckless disregard.

In 38 A.L.R., Page 1424, the question is annotated.

It seems to be settled by the weight of authority that gross negligence or reckless disregard for the rights of others in automobile accidents precludes the defense of contributory negligence.

The appellants did not produce any proof that Avenell Newby was guilty of contributory negligence or that she was intoxicated.

Error is predicated upon the refusal of the Court to instruct the jury in a separate instruction that the testimony of Sid Close should not be considered. Specification of Error 28. The Court had already instructed the jury:

“You should not consider any evidence offered by either side and rejected by the Court, nor should you consider any evidence ordered stricken from the record.” (R) 375.

Furthermore, the appellants cannot object or complain of evidence stricken in support of their objection or motions.

McCoy v. Krenzel, 52 Ida. 626, 17 Pac. 2d 547.

Error is also predicated upon the Court giving an instruction with reference to the law of the State of

Idaho as to the general duties of one driving a motor vehicle upon the highway. (R) 369. Specification of Error 17. This instruction could not have been confusing to the jury and the jury was specifically instructed that the appellees must recover under the guest statute and the guest statute was quoted and defined. (R) 367. However, the jury was entitled to know the law as to the rules of the road in Idaho on the question whether or not the driver was violating the law in order to assist them in determining whether he acted recklessly. The Court would undoubtedly also have been justified in instructing the jury that the President of the United States had requested drivers of automobiles not to drive their vehicles over thirty-five miles per hour. At least, not to drive them sixty miles per hour.

All that any litigant is entitled to, is that his theory of the case be intelligently submitted to the jury. No two jurists use exactly the same language in defining a legal proposition. The instructions are not subject to the criticisms that men of ordinary intelligence could not readily understand them under the evidence. The Court made it very plain that Hair's former recklessness was not proof of his recklessness in the instant case and also made it clear that this former recklessness and evidence of hauling guests was not to be considered against the appellants unless they found from the evidence, first: that he was careless, reckless and



incompetent; and second: that the appellants either knew this or could by reasonable diligence, have known.

“You are instructed that the plaintiffs have alleged **and** the defendants R. J. Reynolds Tobacco Company and L. R. Donnelly, were negligent in permitting Rulon D. Hair to use said automobile knowing him to be reckless (411) and incompetent driver. Before you can consider this charge against the said R. J. Reynolds Tobacco Company and L. R. Donnelly, it would be necessary for you to find from a preponderance of the evidence, first: that Rulon D. Hair was a careless, reckless and incompetent driver; and, secondly: that such facts were known to the R. J. Reynolds Tobacco Company and L. R. Donnelly, and before such matter can be considered by you it would be necessary for you to find that a reasonably prudent man, knowing the facts as shown by the evidence would reasonably conclude that he was of such character. In order that prior specific acts of negligence by a servant, agent or employee should be sufficient to establish the master's negligence in retaining the servant in his employ, the action must be the result of such incompetence of such a character rendering the servant unfit to be retained in his position, and even though you find by a preponderance of the evidence that Rulon D. Hair was a careless, reckless and incompetent driver, yet, if such was not known or by reasonable diligence could have been known to R. J. Reynolds Tobacco Company and L. R. Donnelly, they could not, nor either of them, be held negligent in employing Rulon D. Hair, or keeping him in their employment.” (R) 367.

It is apparent that there is some error, typographical or otherwise, in the first line of the instruction. The word "and" was evidently intended to be "that," or the word "that" may have followed "and," and been omitted, but the jury could not have misunderstood this instruction and the instructions as a whole are such that they fairly presented the law to the jury and the appellants' rights were amply protected.

It is respectfully submitted that the judgment should be affirmed.

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IN THE  
**United States Circuit Court of Appeals**  
FOR THE NINTH CIRCUIT

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R. J. REYNOLDS TOBACCO COMPANY  
and L. R. DONNELLY,

*Appellants*

vs.

GEORGE H. NEWBY, in his own behalf,  
RICHARD ARLEN NEWBY and PATTY ANN NEWBY,  
both minors, by their Guardian ad litem, George H. Newby

*Appellees*

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**Reply Brief of Appellants**

---

On Appeal from the District Court of the United States for the  
District of Idaho, Eastern Division

---

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**Reply Brief of Appellants**

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A short reply brief is deemed advisable to point out wherein it is thought appellees have overlooked certain points of law and controlling evidence and failed to consider various fundamental errors heretofore assigned by appellants.

**ARGUMENT**

**I.**

Appellees were permitted to file an amended complaint wherein they attempted to allege two separate grounds for recovery against appellants, viz., (1) violation of the Idaho Guest Statute by Rulon D. Hair while in the allege scope of his employment, and (2) the retention of Hair by appellants

in their employ knowing him to be "a careless, reckless and incompetent driver of an automobile." The first ground is necessarily predicated upon respondeat superior, and the second on simple negligence.

Appellees now contend that simple negligence is not in the case, but that, they must depend upon a violation of the Idaho Guest Statute and proof that Hair was acting within the scope of his employment on company business at the time of the accident in order to recover against appellants. Their theory of attempting to prove what they contend to be prior acts of negligence on the part of Hair seems to rest upon their claim that appellants waived the necessity of appellees proving Hair's scope of employment because appellants employed what appellees contend was an incompetent driver of an automobile. On page 8 of their brief appellees state that this "case does not present any element of simple negligence as distinguished from reckless disregard or gross negligence." They overlook the fact that gross negligence is not an element of the Idaho Guest Statute.

It is the theory of the appellants that evidence touching prior acts of negligence on the part of Hair should not have been introduced in this case and in any event can only have a bearing on whether or not appellants were negligent in having Hair in their employ, and has no bearing whatever on the alleged violation of the Guest Statute and certainly cannot be considered as a waiver on the part of appellants to require that Hair at all times act within the scope of his employment.

Again, appellees seemingly contend that appellants are



attempting to distinguish "simple negligence" from any other type or degree of negligence. This is entirely erroneous. None of the authorities hold that entrusting an automobile to a known incompetent driver is other than ordinary or simple negligence. Every case cited by appellees on such point makes this clear. The only possible theory upon which any improper acts on the part of a driver of an automobile can be used or introduced to impose liability on the master for employing him is, when such acts are numerous enough to constitute a status of incompetency and are known to the master or have had such widespread publicity as to create a reputation generally known. Inferentially appellees recognize this fact in stating on Page 9 of their brief, "However, if the master knew he customarily acted as he did and that he acted within the scope of his authority, then the master is liable." This standard announced by appellees was certainly not reached in the instant case.

## II.

The Myers accident was the only one which came to the knowledge of appellants. There is not a scintilla of evidence in the record to the contrary. As a matter of fact appellees only attempted to prove that incident and the B. R. Hair of Soda Springs incident in Dubois, Idaho, concerning which there was no knowledge on the part of appellants, and no reasonable grounds on the part of appellants for inferring such. Both of those incidents occurred three and one-half years before the present case arose. There is no proof that Hair "customarily acted as he did." There is no proof or attempted proof that he had a reputation for negligence or carelessness. There is, therefore, but one point to be faced, viz.: Does the

employer's knowledge of but one accident on the part of the driver, even though it was serious, render it negligence for an employer who may have known it, to employ such driver? Is one to conclude that a driver, who has had one accident, is forever barred from similar employment? The cases relied on by appellees answer these questions in the negative. Attention is particularly called to the case of *Southern Pac. Co. vs. Hetzer*, 135 Fed. 272, from which a quotation appears in appellees brief on page 28. Two paragraphs are quoted as if one followed the other. This tends to mislead. The fact is that between these two paragraphs appears the following:

“A single specific act of ordinary negligence, however, has no tendency to prove incompetence, and imposes no such duty upon the master, because perfection is not an attribute of humanity, because ordinary care implies occasional forgetfulness, and hence the risk of the casual negligence of his fellow servant is that of the servant, and not that of the master.” (citing authorities)

Furthermore, in that same case the Court analyzes the various cases on this point and on page 279 says:

“This brief review of the opinions to which counsel for the plaintiff have referred us disclose the fact that, while there are two dicta, there is no adjudication among them in support of the position they have taken. And why should there be such a decision? The issue on trial in a case of this character is the negligence of the master, in that he failed to dismiss a servant who was employed with due care, and whom the law presumed to continue to be competent. Why should specific acts of negligence or the lack of skill of such a servant, of which the master has no know-

ledge or notice, and of which every servant subject to the infirmities of human nature must necessarily sometimes be guilty, be admitted in evidence to establish the negligence of the master in failing to discharge him? The employer is not liable for such acts. The fellow servant has assumed the risk of them. It is only when they have become so grave and numerous as to establish the habit and character, and so notorious as to establish the reputation of lack of care or of skill, that any liability for negligence in retaining the servant can attach to the master. The habit, the character, of a man or of a servant is not made, and it ought not to be provable by isolated, sporadic acts. It is the product of all the acts he performs during his life or his service. If the plaintiff may introduce in evidence two specific acts of alleged negligence of an engineer in stopping his train to prove his habit and character in this regard, and if he has stopped his train a thousand times within a reasonable period preceding the accident, may not the defendant also introduce in evidence the other 998 stops for the same purpose? And may not the parties litigate and submit to the jury the question whether each of these 1000 stops was careful or negligent? It by no means follows from the fact that a servant was guilty of negligence or a lack of skill on a few specified occasions that he is not ordinarily a careful and skillful workman, and the investigation of his specific acts to ascertain his character and habits would tend to confuse the case with collateral inquiries, which, if carefully made, would indefinitely prolong the trial, and would lead the court and jury far away from the issue before them.

“This is not the only reason why such specific acts should not be received. A defendant is entitled to fair notice of the issues upon the trial of which his liability hinges. A complaint that a servant was incompetent, and that the defendant was negligent in that it did not discharge him, informs the master indeed that the habit, character, and reputation of the employe are in

issue; but it is no adequate notice that the character of an isolated or specific act which the servant may have committed is to be tried, and that upon the character of that act the liability of the defendant is to hinge, and it gives the master no opportunity to prepare or to fairly try any such issue."

Several other cases to the same effect have been cited by appellants in their original brief.

On page 15 of appellees' brief it is said: "What difference can it possibly make that the statute has been amended by inserting 'reckless disregard' instead of 'gross negligence'? The contention is answered in *Dawson et al v. Salt Lake Hardware Co.*, *supra*." Here again appellees are in error. "Reckless disregard" was not inserted in the statute instead of "gross negligence." The amendment deleted "gross negligence" and inserted in lieu thereof "intoxication." Nor was the contention raised by appellees considered in the *Dawson* case.

### III.

Notwithstanding the fact that appellees contend the *Dawson* case holds wilful disregard includes negligence, still they argue that contributory negligence and assumed risk do not constitute defenses in a guest case. That argument appears on pages 29-31 of their brief. In making such argument, appellees completely disregard the cases of *Dale vs. Jaeger*, 44 *Ida.* 576, 258 *Pac.* 1081, *Dillon vs. Brooks*, 51 *Ida.* 510, 6 *P2d* 851, and *French vs. Tibben*, 53 *Ida.* 701, 27 *P2d* 475, all of which definitely sustains the proposition that a gratuitous guest may be guilty of contributory negligence preventing recovery, and likewise assumes the risk if the guest does not protest the driving of the host.

In support of appellees' theory that contributory negligence is not a defense, they cite a number of cases on page 30 of their brief. Three of those cases, viz., *Miesmer vs. Dillon*, 42 N. E. 2d 305, *Regan vs. Keating*, 42 N. E. 122, and *Barnes vs. Collins*, 32 N. E. 2d 626, seem to be erroneously cited; they do not appear in the book and page given. The remaining cases either recite statutes which do not contain the words "reckless disregard" (see the Ohio statute in *Universal Pipe Co. vs. Bassett*, 200 N. E. 843, and *Haacke vs. Lease*, 41 N. E. 2d 590) or construe the term "reckless disregard" as not negligence such as the Iowa cases or that the term means "wanton misconduct," as appears from the Connecticut case of *Bordonaro vs. Senk*, 147 Atl. 136. But it is to be remembered that appellants are charged with negligence, hence the plea of contributory negligence is available; also that the term "reckless disregard" was part of the Idaho statute when *French vs. Tibben*, 53 Ida. 701, 27 P 2d 475, was decided, and here as there the case was tried upon such theory and no complaint was made by appellees until their brief was filed.

In the case at bar Mrs. Newby was on a party with Hair for 18 hours (R.315-316). Hair testified to the fact that she had been drinking (R. 297, 321). Her doctor unwillingly admitted alcoholic odor on her breath when she was brought to the hospital (R. 165) and alcoholic content of her stomach (R.166). She never at any time protested the manner in which Hair was driving the car (R. 300-301). She was constantly with him, knew all that was done, and if his conduct was out of line, she knew all about it and acquiesced in it. Contributory negligence and assumption of risk was as clearly



proved as in the case of French vs. Tibben, 53 Ida. 701, Dillon vs. Brooks, 51 Ida. 510, and Dale vs. Jaeger, 44 Ida. 576.

#### IV.

On page 22 of their brief appellees argue that there was dispute in the evidence as to whether or not Hair was on company business. They say, "The appellees do not believe Mr. Hair's story that Mrs. Newby had been with him all night: Such a statement is absolutely unsupported by any evidence except of Hair." On the contrary, appellants contend that the presumption which arose, by Hair driving the company's truck, was completely overcome, without a scintilla of evidence to support the presumption. Hair testified that he met this woman at about 9:00 o'clock on the evening of September 10th, and they began their party and their visits to night clubs, which did not end 'till the accident at 4:30 P. M. the next day (R. 295-300; 315-316). Durwood Perkins testified that a woman who said her name was Avenell called Hair on the telephone between 7:00 and 9:00 o'clock in the evening; he answered the phone and she asked to talk to Hair and she said, "Just say Avenell is calling," and thereupon he called Hair to the telephone (R. 355-356). Hair testified that following this call he met her on the street and she went with him to his cabin, and about 9:30 or 10:00 o'clock they left for the Aero Club (R.315).

Appellants had alleged and maintained throughout the case that Mrs. Newby and Hair had been consorting for a number of hours, including the night of the 10th and day of the 11th of September, all of which could have been disproved by appellees if such had not been a fact. If Mrs. Newby had not been out all night her presence at home or elsewhere would

have been established. Her husband could not or would not testify where she was on the night of the 10th (R.177-181). Her brother, Russell Teuscher, admitted on cross-examination that he told Mr. Donnelly that he got the children and took them to his home but would not fix the date. At R. 240 he was asked and answered as follows:

“Q. Didn’t you tell him you went and got the children because their mother wasn’t home?

A. The date I didn’t know.

Q. Did you tell him you got the children?

A. Yes, that I got the children.

Q. And that they were with you?

A. Yes, I did.”

It certainly can’t be contended that Hair’s testimony is not conclusive when thusly corroborated and there is a total absence of proof to the contrary which could easily have been made if factual and true.

There is no dispute in the evidence touching the conduct of Hair and Mrs. Newby during those 18 hours. It has all been detailed in appellants’ original brief, and it is submitted, such shows conclusively that Hair was off on a wild party, utterly forgetful of any duties to his employer, and devoting his attention wholly and completely to his own pleasure and that of Avenell Newby. To even argue under such circumstances that Hair was acting within the scope of his employment disregards the plain, undisputed, unimpeached testimony. The

presumption arising from Hair's use of the Company's truck was as completely overcome as it was in *Magee vs. Hargrove Motor Co.* 50 Ida. 442, and 296 Pac. 774. The fact that the truck had a Company sign on it does not affect this rule; *White vs. Firestone Tire & Rubber Co.*, 90 Fed. 2d 637; and neither does the fact that some of the Company products were in the car at the time of the accident; *Allen vs. Ross* (Ark.) 138 S. W. 2d 409.

It is therefore appellants' contention that at the time this accident occurred, Hair was not, and had not been for 18 hours, acting within the scope of his employment and, that appellants were in no wise liable for his conduct during that period of time.

The one accident which came to appellants' knowledge three and one-half years earlier was insufficient to establish Hair's status as incompetent, or to render appellants negligent in retaining him in their employ and, that the one or two other minor derelictions on the part of Hair were not known and could not have been known by appellants. On either theory appellees' case must fall.

Furthermore, Hair had positive written instructions forbidding him hauling guests in this truck. These instructions were given and emphasized after the Myers accident, and Hair definitely promised to obey them. There is no evidence from which a jury could possibly conclude that those instructions had been waived. Appellees recite that Donnelly said to Hair in the presence of others: "Good God, did you have a woman with you again, I didn't know that." (R.237), which alleged statement Calvin Teuscher changed a bit (R.243). Donnelly

denied having made such statements (R.344). Assuming however he made them, the element of surprise and wrath evoked in Donnelly definitely disproves any charge of waiving those instructions.

Appellants believe that the cases all clearly hold that where an employee carries passengers as guests contrary to instructions, such conduct places him outside the scope of employment so far as injury to the guest is concerned. See *Albers vs. Shell Oil Co.* (Cal.) 286 Pac. 572, *Hartigan vs. Public Ledger* (Penn.) 140 Atl. 524, *Chajnicki vs. Dougherty* (Mich.) 235 N. E. 789, and others cited on page 50 of appellants' brief.

## V.

Appellants contend in their original brief that the Court erred in giving certain instructions to the jury, to which exceptions were taken, and in refusing to give nine requested instructions, all of which appear on pages 19-29 of their brief and are argued on pages 70-78 thereof. Appellees have given attention only to those requested instructions dealing with contributory negligence and assumption of risk, to which reference has heretofore been made. The error in refusing to instruct the jury, touching the testimony of Sid Close, and in giving to the jury an instruction covering in general the law of the road have not been answered by appellees. The mere fact that the Court had instructed the jury not to consider any of the evidence offered, or stricken from the record, is not an answer to appellants' contention that the instruction touching Sid Close's testimony should have been given.

In answer to appellants' objection to giving the instructions as to the general duties of one driving a motor vehicle

on the highway, notwithstanding that this has nothing to do under the Guest Statute upon which appellees say they predicate their case, appellees argue that the jury was entitled to know the law of the road to determine whether or not Hair acted recklessly. This appellants contend is not an answer to appellants' objection. It left the jury with the idea that appellants might be held for any dereliction of Hair.

Appellants respectfully insist that errors touching instructions referred to by appellees, have not been satisfactorily answered and that a complete disregard of the remaining errors assigned is in effect an admission by appellees of the truth of such assignments of error.

It is therefore respectfully submitted that this case should be reversed as to appellants and that they recover their costs.

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No. 10728

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United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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WILLIAM H. BARR, a minor and AGNES D.  
BARR, a minor, by ZEILA M. BARR, their  
guardian,

Appellants,

vs.

THE TRAVELERS INSURANCE COMPANY,  
Appellee.

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Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California  
Southern Division

FILED

SEP 25 1944

PAUL P. O'BRIEN,  
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For the Ninth Circuit.

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WILLIAM H. BARR, a minor and AGNES D.  
BARR, a minor, by ZEILA M. BARR, their  
guardian,

Appellants,

vs.

THE TRAVELERS INSURANCE COMPANY,  
Appellee.

---

Transcript of Record

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Upon Appeal from the District Court of the United States  
for the Northern District of California,  
Southern Division



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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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## NAMES AND ADDRESSES OF ATTORNEYS

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San Francisco, California

JOHN J. TAAFFE, ESQ.,

630 Phelan Building  
San Francisco, California

Attorneys for Plaintiffs and Appellants,

MESSRS. O'CONNOR, NEUBARTH & MORAN  
LEO R. FRIEDMAN, ESQ.,

935 Russ Building  
San Francisco, California,

Attorneys for Defendant and Appellee.

In the Superior Court of the States of California,  
in and for the City and County of San Francisco

No. 317430

WILLIAM H. BARR, minor, and AGNES D.  
BARR, a minor, by ZEILA H. BARR, their  
guardian,

Plaintiffs,

vs.

THE TRAVELERS INSURANCE  
COMPANY,

Defendant.

### COMPLAINT

Now come the plaintiffs above named and for  
cause of action against the defendant above named  
allege:

#### I.

That plaintiff above named William H. Barr is a  
minor of the age of 17 years; that plaintiff above  
named Agnes D. Barr is a minor of the age of 14  
years; that said William H. Barr and said Agnes  
D. Barr are the minor children of Arthur Barr,  
deceased, and Zeila H. Barr; that said Zeila H.  
Barr by an order duly made, rendered and entered  
in and by the Superior Court of the State of Cali-  
fornia, in and for the County of Marin, on the 2nd  
day of July, 1942, was duly appointed and there  
and then qualified as guardian of the persons and  
estates of said minors, William H. Barr and Agnes  
D. Barr; that said Zeila H. Barr ever since said



2nd day of July, 1942, has been and now is the duly appointed, qualified and acting guardian of the persons and estates of [2\*] said William H. Barr and said Agnes D. Barr.

## II.

That during all of the times herein mentioned defendant has been and is now a corporation organized and existing under and by virtue of the laws of the State of Connecticut.

## III.

That on or about the 26th day of February, 1932, defendant above named, in consideration of a premium and for other good and valuable considerations then paid by said Arthur Barr, deceased, to defendant, then and there insured the life of said Arthur Barr, deceased, and executed and delivered to said Arthur Barr, deceased, a policy of insurance wherein and whereby said defendant agreed to and did insure the life of said Arthur Barr; that a photostat which is a full, true and correct copy of said policy of insurance, is attached hereto, marked Exhibit "A", is hereby referred to and is made a part hereof as though the same were set forth herein in full.

## IV.

That in and by said policy of insurance defendant agreed to pay to said William H. Barr and said Agnes D. Barr in equal shares as beneficiaries under the terms of said policy of insurance the sum

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\*Page numbering appearing at foot of page of original certified Transcript of Record.

of Ten Thousand Dollars (\$10,000) upon the death of said Arthur Barr, deceased, and an additional Ten Thousand Dollars (\$10,000) immediately upon receipt of due proof that the death of said Arthur Barr, resulted from bodily injuries effected directly and independently of all other causes through external, violent and accidental means, within ninety (90) days from the date of the accident which caused such injuries and of which, except in the case of drowning or internal injuries revealed by an autopsy, there should be a visible contusion or wound on the exterior of the body of said Arthur Barr. [3]

#### V.

That the said Arthur Barr paid all premiums required to be paid by said policy and contract of insurance and duly performed all the conditions and requirements on his part required to be performed by said contract and policy of insurance; that plaintiffs and each of them duly performed all the conditions and requirements on their part required to be performed by said contract and policy of insurance; that ever since said 26th day of February, 1932, said contract and policy of insurance has been and now is in full force and effect.

#### VI.

That said Arthur Barr died on the 6th day of June, 1942, and that the death of said Arthur Barr resulted from bodily injuries effected directly and independently of all other causes through external, violent and accidental means, to-wit, a tick bite suf-

ferred by said Arthur Barr on or about the 31st day of May, 1942, and which said tick bite caused a visible contusion on the exterior of the body of said Arthur Barr, as well as internal injuries revealed by an autopsy.

## VII.

That the said William H. Barr and the said Agnes D. Barr gave to defendant due notice and proof, in writing, of the death and the said cause thereof of the said Arthur Barr, deceased, and furnished proof of the death of said Arthur Barr, deceased, on the forms required by said defendant and have made demand on said defendant for the payment to them in equal shares of the sum of Twenty Thousand Dollars (\$20,000) as required as aforesaid by said contract and policy of insurance; that said defendant has paid to said William H. Barr and said Agnes D. Barr the sum of Ten Thousand Dollars (\$10,000), but has failed, refused and neglected to pay said additional amount of Ten Thousand Dollars (\$10,000) as required by said contract and policy of insurance and no part of said additional sum of Ten Thousand Dollars (\$10,000) has been paid said William H. Barr and said Agnes D. Barr in equal [4] shares, or otherwise, as required by said contract and policy of insurance, and the whole thereof is now due, owing and unpaid.

Wherefore, plaintiffs pray judgment against defendant for the sum of Ten Thousand Dollars (\$10,000), lawful money of the United States of Amer-

ica, together with interest thereon at the rate of seven percent (7%) per annum from the 6th day of June, 1942, together with costs of suit herein, and for such other relief as to the Court may seem meet and just in the premises.

KEITH R. FERGUSON

JOHN J. TAAFFE

Attorneys for Plaintiffs.

State of California

City and County of San Francisco—ss.

John J. Taafe, being duly sworn on behalf of the plaintiffs in the above entitled action, says:

That he has read the foregoing complaint, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on information or belief, and as to those matters that he believes it to be true; that said plaintiffs are absent from the City and County of San Francisco, State of California, where their attorney John J. Taafe has his office, and that the affiant is one of the attorneys for plaintiffs and therefore makes this affidavit of verification.

JOHN J. TAAFFE

Subscribed and sworn to before me this 30th day of March, 1943.

(Seal)

JACOB S. MEYER

Court Commissioner of the City and County of San Francisco, State of California. [5]

# The TRAVELERS

## INSURANCE COMPANY HARTFORD CONNECTICUT

Number	-1687927	Amount
Insured	Arthur Barr	Insurance \$10,000
Age	41	Retirement Income \$100.00
Beneficiary	William H. Barr, Son & Agnes D. Barr, Daughter, in equal shares, if living, otherwise to Zella C. Barr, Wife.	Maturity Date February 16, 1956
Premium	\$34.30	
How Payable	Monthly	For 24 Full Years
When Payable	On the 16th	day of each month
Effective Date	February 16, 1932	In each year.

### By this Contract of Insurance Agrees to Pay

**Insurance** to the above named Beneficiary at the Home Office of the Company in Hartford, Connecticut, immediately on receipt of due proof of the death of the insured, during the continuance of this contract, before the Maturity Date, and provided there shall have been no default in premium payments, the amount of insurance stated above, or the cash value thereof as determined on the second page if it shall be greater.

**Retirement Income** If the insured shall be living on the Maturity Date, this insurance shall then terminate and if all premiums hereunder shall have been paid and if there shall be no indebtedness to the Company on account of this contract, then the insured shall receive the first installment of the Retirement Income stated above and a like amount monthly thereafter during the natural life of the insured.

If there shall be an indebtedness hereunder, the amount of such monthly income shall be reduced in the proportion that such indebtedness bears to the cash payment available at the Maturity Date and the indebtedness shall thereby be discharged.

If the Insured shall die after the Maturity Date and before having received one hundred such monthly payments, the remainder thereof shall be payable as they become due to the Beneficiary hereinbefore named who shall have the option of commencing such payments into one sum on the basis of interest at the rate of three and one-half per centum per annum.

**Premium** This contract is issued in consideration of the signed application for this insurance which is made stated, in exchange for a receipt signed by the President or a Secretary and countersigned by an authorized agent of the Company.

**When Payable** The first such premium payment shall be made on the delivery of this contract, and a like payment on or before the dates specified above for premium payments in each year, until the premiums for the full number of years above stated shall have been paid, or until the prior death of the insured.

**Where Payable** Premiums shall be paid in advance at the Home Office or to an authorized agent of the Company. This insurance shall be effective from the date so specified above. The Insurance Years and all subsequent provisions for Cash Loans, Cash Values, Paid-up and Automatic Term Insurance and Paid-up Retirement Income Values are computed from that date.

**Effectivity Date** This contract shall be incontestable after it shall have been in force for a period of one year from the date of issue except for non-payment of premiums, and except for violation of the conditions of this contract relating to military or naval service in time of war if such service shall be restricted by contract entered into at date of issue. It is otherwise free from conditions as to residence, occupation, travel or place of death.

This contract is subject to the privileges and conditions recited on the subsequent pages hereof.

In Witness Whereof THE TRAVELERS INSURANCE COMPANY has caused this instrument to be executed at

Hartford, Connecticut, this Twenty-sixth day of February 1932

*Emilia Shaw*  
Department Secretary

*Wm. J. Gorman*  
Executive, Life Department

*L. E. Zacher*  
President

Insurance To Age 65 with Retirement Income

Premiums Payable For 24 Years Non-Participating









Rider to be Attached to Contract No. 1687927

Issued upon the Life of Arthur Barr

Anniversary of Date of Birth	Amount of Income	Income Payable	Certain Period
Option 1.	50th	1.69	Monthly
Option 2.	55th	3.44	Monthly
Option 3.	60th	5.99	Monthly
			100 Months
			100 Months
			100 Months

If all the premiums under the contract shall have been paid and if there shall be no indebtedness thereunder the Insured may, in lieu of any other settlement provided in the contract, elect one of the options stated above, and upon written request made by the Insured prior to the anniversary of the contract nearest the anniversary of the date of birth, the Company will pay for each \$1,000 of insurance a life income in the amount stated above, the first such payment to be made as of the anniversary elected, payments thereafter to be made at the intervals above stated. If the Insured shall die after the anniversary elected and before receiving all the payments for the certain period specified above, payments for the remainder of such period shall be made in like manner to the Beneficiary named in the contract.

THE TRAVELERS INSURANCE COMPANY

L. M. ROBOTHAM

Department Secretary

Hartford, Connecticut February 26, 1932.

47008 [8]

Rider to be Attached to Contract No. 1687927

Issued Upon the Life of Arthur Barr

Special Option available at the end of the 15th Contract Year

Upon written request made by the Insured within three months of the expiration of the above specified contract year the Company will without evidence of insurability, provided the contract shall be free from indebtedness, indorse the contract for paid-up life insurance in the amount of 10,270.00

Such paid-up insurance shall be in lieu of any other settlement provided in the contract.

THE TRAVELERS INSURANCE COMPANY  
L. M. ROBOTHAM

Department Secretary

Hartford, Connecticut February 26, 1932.

46603 [9]

Additional Indemnity Contract

Insured Arthur Barr

Under Life Contract No. 1687927

Additional Indemnity \$10,000

Premium \$1.10

Payable Monthly

The Travelers Insurance Company agrees to pay the Beneficiary named in the above numbered Life Contract the amount of additional Indemnity above stated in addition to the amount of insurance payable in the event of the death of the Insured under the said Life Contract immediately upon receipt of due proof that the death of the said Insured has resulted from bodily injuries effected directly and independently of all other causes through external, violent and accidental means within ninety days from the date of the accident which shall have



caused such injuries and of which, except in the case of drowning or internal injuries revealed by an autopsy, there is a visible contusion or wound on the exterior of the body, and provided such death does not result from

(a) Disease of any kind, directly or indirectly ;

(b) Suicide, while sane or insane ;

(c) Any act of war, or while in military or naval service in time of war ;

(d) Injuries sustained while in any boat or vessel for submarine navigation ;

(e) Any hazard of aviation except as hereinafter provided.

It is further agreed that the Additional Indemnity hereby provided will be paid if the death shall result from injuries caused by any of the hazards of aviation while the insured is riding as a passenger in a licensed passenger aircraft provided by an incorporated passenger carrier and while operated by a licensed pilot on a regular passenger route between definitely established airports, but shall not be payable if the death of the Insured shall result from injuries sustained in any military or naval aircraft or in any form of aviation travel or hazard not herein specified, nor for death resulting from injuries sustained by the Insured while acting as a pilot, navigator or mechanic of an aircraft.

It is further agreed that this Additional Indemnity will be paid only in the event that the accident which shall cause such death shall occur before a default in the payment of any premium required under this Contract or under the said Life Con-

tract, before any benefit or value under any of the provisions in such Life Contract other than cash loans shall have been claimed and allowed and before the anniversary of such Life Contract nearest the sixty-fifth anniversary of the birthday of the Insured, if the insurance extends beyond such anniversary.

This Contract is issued in consideration of the premium specified above, payable as hereinabove stated while this Contract shall remain in force on the same dates and under the same conditions as the premium on the said Life Contract. This Contract may be cancelled at any time by the Insured without prejudice to said Life Contract.

THE TRAVELERS INSURANCE COMPANY,

L. M. ROBOTHAM

Department Secretary

R. O. MCGOWAN

Recorder, Life Department

Dated at Hartford, Connecticut February 26, 1932.  
Additional Indemnity Contract.

47411 [10]

Provision for Waiver of Premiums  
in event of  
Permanent Total Disability

Attached to and made part of a contract of Life  
Insurance issued by The Travelers Insurance  
Company

Under Contract No. 1687927 to Arthur Barr the  
Insured

Additional Monthly Premium \$1.50

In consideration of the application which forms a part of the above numbered contract and of the additional premium hereinabove stated payable on the same dates and under the same conditions as the premium on the contract to which this provision is attached, the following provisions for permanent total disability benefits are hereby made a part of said contract:

Upon due proof, following notice of claim submitted during the lifetime of the Insured, that since the payment of the initial premium upon the contract and upon this provision, before a default in payment of any subsequent premium, before the Maturity Date, if any, so designated on the first page of the contract and before the anniversary of the contract nearest the sixtieth anniversary of date of birth, the Insured has, during the continuance of the contract, become and at the time of giving such notice is wholly disabled by bodily injuries or disease and thereby prevented from engaging in any occupation or employment for remuneration or profit and has been so prevented for a period of

not less than six consecutive months the following benefits will be granted:

1. The Company will waive the payment of any premiums which may fall due on the contract during such disability and will refund any premiums previously paid during such disability, but no waiver or refund will be made for a period in excess of one year prior to such notice. The privileges and values of the contract shall be the same as if such premium payments were made by the Insured.

2. Any premiums waived under this provision will not be deducted in any settlement under the contract.

3. Independently of all other causes the Company will consider as total disability the entire and irrecoverable loss of the sight of both eyes, or of the use of both hands, or of both feet, or of one hand and one foot.

If any premium due under the contract shall be in default when notice of claim hereunder is received disability benefits shall be allowed only if the total disability shall have existed continuously from a date prior to expiration of the grace period of the first premium in default, and provided such due date is subsequent to date of payment of the initial premium hereunder. If the inception of such disability shall have been during such grace period the Insured shall be liable to the Company for the payment of premium then due.

If and when the Insured shall cease to be totally disabled, all benefits hereunder shall cease and pre-

miums falling due thereafter shall be payable by the Insured.

Failure to present notice of disability within the time provided herein shall not invalidate any claim if it shall be shown that such notice was given as soon as was reasonably possible.

Upon written request signed by the Insured and upon return of this provision for proper indorsement, the Company will annul this provision and the additional premium charged for these benefits shall no longer be payable.

In any event no premium for this provision shall be payable on or after the anniversary of the contract nearest the sixtieth anniversary of the date of birth of the Insured, and none of the benefits herein described shall be allowed for any disability which has its commencement after such anniversary.

In Witness Whereof The Travelers Insurance Company has caused this provision to be executed at Hartford, Connecticut, this Twenty-sixth day of February 1932.

L. M. ROBOTHAM

Department Secretary

R. O. MCGOWAN

Recorder, Life Department

L. E. ZACHER

President

Standard Disability Provision  
Premium Waiver









## General Conditions

Modifications, etc.—No agent can make, alter or discharge this contract or extend the time for payment of premiums, nor can this contract be varied or altered or its conditions waived or extended in any respect, except by the written agreement of the Company, in compliance with the law of the state in which the contract is issued, signed by the President, or one of the Vice-Presidents or Secretaries, whose authority will not be delegated

Misstatement of Age—If the age of the Insured was incorrectly stated the amount payable hereunder shall be the insurance which the actual premium paid would have purchased at the true age of the Insured. Age will be admitted on satisfactory proof.

Date of Issue—The date of issue as used in this contract means the date on which this instrument is executed at Hartford, Connecticut.

Non-Payment of Premiums—If any premium shall not be paid on or before the date when due the liability of the Company shall be only as hereinbefore provided.

Assignment—No assignment hereof shall be binding upon the Company unless made by an instrument in writing indorsed upon this contract or attached hereto, nor unless a duplicate shall be furnished to the Company forthwith upon its execution. The Company shall not be held responsible for the validity of any such assignment. Any claim made under an assignment shall be subject to proof of interest and extent thereof.

Indebtedness—Any indebtedness to the Company on account of this contract will be deducted in any settlement hereunder.

Suicide—In case of suicide committed while sane or insane within one year from date of issue of this contract the limit of recovery hereunder shall be the premiums paid.

Reserve Basis—The reserve for which funds are to be held upon this contract shall be computed upon the American Experience Table of Mortality and interest at  $3\frac{1}{2}\%$  per annum by the net level premium reserve method.

Entire Contract—This instrument and the application constitute the entire contract between the parties hereto, and all statements purporting to be made by or on behalf of the Insured shall in the absence of fraud be deemed representations and not warranties and no statement shall avoid the contract or be used in defence to a claim under the contract unless it be contained in the application herefor and a copy of such application is attached hereto. [13]

The Travelers  
Insurance Company  
Hartford Connecticut  
No. 1687927  
Arthur Barr  
Insurance to Age 65 with  
Retirement Income  
Non-Participating

In the event of death, notice should be given immediately to the nearest branch office of the Company.



It is not necessary for the Insured or the Beneficiary to employ any person to collect any benefit provided in this contract.

Phone S. R. 229

(Cut)

Kent & Minto

Insurance Agency, Inc.

“Complete Insurance Service”

711 Fourth St., San Rafael

[Endorsed]: Filed Mar. 31, 1943 H. A. van der Zee, Clerk, by D. E. Dunn, Deputy Clerk.

[Endorsed]: Filed May 6, 1943, U. S. District Court. [14]

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No. 317430

PETITION FOR REMOVAL TO THE  
UNITED STATES DISTRICT COURT

To the Honorable Superior Court of the State of California, in and for the City and County of San Francisco;

Your petitioner, The Travelers Insurance Company, a corporation, respectfully shows and alleges as follows:

I.

Your petitioner is the defendant in the above entitled action, and the only defendant in said action served with process therein. Said action, as appears from plaintiff's Complaint on file therein,

is of a Civil nature at law, brought by plaintiff to recover judgment against said defendant in the sum of Ten Thousand and No/100 Dollars, (\$10,000.00), together with interest thereon at the rate of Seven per cent, (7%), per annum from the 6th day of June, 1942, and together with plaintiff's costs of suit and other relief as to the court may seem meet and proper, which claim petitioner wholly contests and denies; [15] and petitioner alleges that the amount involved and the matter in dispute or controversy in said action, exceed, and that each of them exceeds, exclusive of interest and costs, the sum or value of Three Thousand and No/100 Dollars, (\$3,000.00).

## II.

That plaintiffs, William H. Barr, a minor, and Agnes D. Barr, a minor, and Zeila H. Barr, guardian of said minors, were and each of them was, at the time of the commencement of this action, and that each of them ever since have been and they now are and each of them now is, a citizen of the State of California and a resident of and the Southern Division of the Northern District of said State. That your petitioner, The Travelers Insurance Company, a corporation, the defendant, was at the time of the commencement of said action and ever since has been and now is a corporation incorporated and existing under and by virtue of the laws of the State of Connecticut, and a citizen and resident of said last named state and a non-resident of the State of California.

## III.

That at the time of the commencement of said action, there was and ever since has been and still is therein, a controversy wholly between citizens of different States which can be fully determined between them, that is to say, between the plaintiffs, citizens of the State of California, resident in the Southern Division of the Northern District of said State, on the one hand, and a corporation, defendant and petitioner herein, a citizen and resident of the State of Connecticut, on the other hand.

## IV.

That service of summons was made in this action [16] on your petitioner on the 31st day of March, 1943, in the City and County of San Francisco, State of California, and your petitioner is not required by the laws of the State of California or by the rules of the above entitled court in which said action is brought, to answer or plead to the complaint therein until the 10th day of April, 1943.

## V.

That by reason of the foregoing facts, your petitioner alleges that said cause is properly removable to the United States District Court, in and for the Northern District of California, upon the ground of the diverse citizenship of the parties; and it petitions for the removal of said action to said United States District Court upon that ground.

## VI.

Your petitioner files and offers herewith, its bond with good and sufficient surety of its entering in the Southern Division of the United States District Court in and for the Northern District of California, within thirty days from the date of the filing of this petition for the removal of said cause, a certified copy of the record of said action and for paying all costs that may be awarded by said District Court if said Court shall hold that said action was wrongfully or improperly removed thereto.

Wherefore, your petitioner prays that this Honorable Court accept said bond as good and sufficient, to make its Order for the Removal of said action to the Southern Division of the United States District Court, in and for the Northern District of California, pursuant to the act of Congress in such cases made and provided, and for such other and further Order as may be proper, and to cause all the records herein to be removed to said District Court, and that no other or [17] further proceedings be had in said action in said Superior Court of the State of California, in and for the City and County of San Francisco.

THE TRAVELERS INSUR-  
ANCE COMPANY,

By LEO. R. FRIEDMAN  
O'CONNOR, NEUBARTH &  
MORAN

LEO R. FRIEDMAN

Attorneys for The Travelers  
Insurance Company [18]

State of California,  
City and County of San Francisco—ss.

Leo R. Friedman, being first duly sworn, deposes and says:

That he is one of the attorneys for the petitioner in the foregoing action; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes it to be true; that this verification is made by affiant and not by said petitioner for the reason that said petitioner and all officers authorized to swear oaths on its behalf, are absent from City and County of San Francisco in which City and County the attorneys for said petitioner have their offices.

LEO R. FRIEDMAN

Subscribed and sworn to before me this 8th day of April, 1943.

[Seal]                      LOUIS WIENER

Notary Public in and for the City and County of  
San Francisco, State of California.

[Endorsed]: Filed May 6, 1943. U. S. Dist.  
Court. [19]



[Title of Court and Cause.]

No. 317430

NOTICE OF PETITION FOR REMOVAL TO  
THE UNITED STATES DISTRICT COURT

(With copy of Petition and Bond for Removal  
Attached)

To: Plaintiffs above named and to Messrs. Keith R.  
Ferguson and John J. Taafe, attorneys at law,  
attorneys for said Plaintiffs:

You and Each of You Will Please Take Notice  
that The Travelers Insurance Company, a corpora-  
tion, one of the defendants in the above entitled  
action, intends to file therein, a petition and bond  
for removal, copies of which petition and bond are  
attached hereto and made a part hereof, reference  
to which is hereby expressly made for further par-  
ticulars, and that it will, on Friday, the 9th day  
of April, 1943, at 10 o'clock A. M. of said day, or  
as soon thereafter as counsel can be heard, apply  
to the above entitled court at the Courtroom  
thereof, Law and Motion Department, in the City  
Hall at the City and County of San Francisco, [20]  
State of California, Polk Street, Van Ness Ave-  
nue and McAllister Street, for an Order upon  
said petition and bond and upon this Notice, re-  
moving said cause to the Southern Division of the  
United States District Court, in and for the North-  
ern Division of California.

Dated: April 8, 1943.

O'CONNOR, NEUBARTH &  
MORAN

LEO R. FRIEDMAN

Attorneys for Petitioner.

[Endorsed]: Filed Apr. 8, 1943. H. A. van der Zee, Clerk By D. T. Wood, Deputy Clerk.

[Endorsed]: Filed May 6, 1943. U. S. District Court. [21]

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[Title of Superior Court and Cause.]

### BOND ON REMOVAL OF CAUSE

Know All Men by These Presents: That We, The Travelers Insurance Company as Principal and American Surety Company of New York, a corporation organized under the laws of the State of New York, and duly authorized to transact business in the State of California, as Surety, are held and firmly bound unto William H. Barr, a minor and Agnes D. Barr, a minor by Zeila H. Barr, their guardian, Plaintiffs in the above-entitled action, their successors and assigns, in the sum of Five Hundred and No/100 Dollars, lawful money of the United States of America, for the payment of which, well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Signed and Sealed this 7th day of April, 1943.

The Condition of the above obligation is such, that Whereas, said The Travelers Insurance Company has petitioned or is about to petition the Superior Court of the City and County of San Francisco, State of California, for the removal of that certain cause therein pending wherein William H. Barr, a minor and Agnes D. Barr, a minor, by Zeila H. Barr, their guardian, are the Plaintiff, and the said The Travelers Insurance Company is the Defendant, to the Southern Division of the District Court of the United States, for the Northern District of California, for further proceedings on grounds in said petition set forth, and that all further proceedings in said action in said Superior Court of the City and County of San Francisco, State of California, be stayed:

Now, Therefore, if said petitioner, The Travelers Insurance Company, shall enter in said District Court of the United States, aforesaid, within thirty (30) days from the date of the filing of the petition, a certified copy of the records of said suit, and shall pay all costs that may be awarded therein by said District Court of the United States, if said Court shall hold that said suit was wrongfully or improperly removed thereto, then this ob-

ligation shall be void; otherwise to remain in full force and effect.

THE TRAVELERS INSUR-  
ANCE COMPANY

By A. C. de SOUSA

Principal

AMERICAN SURETY COM-  
PANY OF NEW YORK

By L. E. PLATT

Resident Vice-President.

Bond #774265-K

Prem. \$10.00 Term.

Attest:

B. D. SPERRY

Resident Asst. Secretary.

[Endorsed]: Filed May 6, 1943. U. S. District  
Court. [22]

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No. 317430

[Title of Court and Cause.]

ORDER FOR REMOVAL

On reading the petition of defendant, The Travelers Insurance Company, for the removal of the above entitled cause to the Southern Division of the United States District Court in and for the Northern District of California, and the bond for removal on behalf of said defendant, The Travelers Insurance Company, which said petition and bond have been heertofore filed in said action, and

it appearing to this Court that written notice of said petition and bond for removal was duly given by said defendant to plaintiffs prior to filing said petition and this matter coming on for hearing said bond is hereby approved, and accepted as good and sufficient and all things being by this Court heard and considered.

It is hereby ordered that said cause be and the same is hereby removed to the Southern Division of the United States District Court in and for the Northern District of California.

Dated: San Francisco, California, April 9, 1943.

THERESA MEIKLE

Judge of the Superior Court

[Endorsed]: Filed Apr. 9, 1943. H. A. van der Zee, Clerk. By H. Brunner, Deputy Clerk.

[Endorsed]: Filed May 6, 1943. U. S. Dist. Court. [23]



In the Southern Division of the United States  
District Court, in and for the Northern Dis-  
trict of California

No. 22609-G

WILLIAM H. BARR, a minor, and AGNES D.  
BARR, a minor, by ZEILA H. BARR, their  
guardian,

Plaintiffs,

vs.

THE TRAVELERS INSURANCE COMPANY,  
Defendant.

### ANSWER

Now comes The Travelers Insurance Company, the defendant in the above entitled action, and files this its answer to the complaint on file in said action and denies and avers as follows:

Answering paragraphs III and IV of said complaint, said defendant admits and avers that on the 26th day of February, 1932, defendant executed and delivered to said Arthur Barr its policy of insurance, a copy of which is attached hereto and marked Exhibit "A" and made a part hereof, save as thus admitted and averred, defendant denies each and all of the allegations of paragraphs III and IV in said complaint and each and every part thereof.

Answering paragraph V of said complaint, defendant denies that plaintiffs and/or each or any of them, duly performed all the conditions and/or requirements on their part required to be [24]

performed by said policy of insurance in this that plaintiffs failed and still fail to furnish defendant with proof that the death of the said Arthur Barr resulted from bodily injuries effected directly and independently of all other causes through external, violent and accidental means as provided in said policy or at all.

Answering paragraph VI of said complaint, as to the allegation in said paragraph that said Arthur Barr received a tick bite said defendant has no information or belief and basing its answer on that ground, said defendant denies said allegation; said defendant denies that the death of said Arthur Barr resulted from bodily injuries or any bodily injury effected directly and/or independently of all other causes through external, violent and/or accidental means and denies that the death of said Arthur Barr resulted from a tick bite suffered by said Arthur Barr and/or which said tick bite caused a visible contusion on the exterior of the body of said Arthur Barr and/or internal injuries or any injury revealed by an autopsy or otherwise.

Answering paragraph VII in said complaint, defendant denies that said William H. Barr or said Agnes D. Barr gave to defendant due notice and/or proof of the death and/or the cause thereof of Arthur Barr and/or furnished proof of the death of said Arthur Barr on the forms required by said defendant or otherwise that the death of said Arthur Barr resulted from bodily injuries effected directly and/or independently of all other

causes through external, violent and/or accidental means. And further denies that the payment of Ten Thousand Dollars (\$10,000) or any additional sum was required by said contract and policy of insurance and denies that defendant has failed, refused and neglected to pay any sum required by said contract and policy and due thereon.

Wherefore, defendant prays that it be hence dismissed with its costs.

O'CONNOR, NEUBARTH &  
MORAN

Attorneys for Defendant [25]

State of California,  
City and County of San Francisco—ss.

Arthur S. Holman, being first duly sworn, deposes and says:

That he is an officer, to-wit: Manager of The Travelers Insurance Company, the defendant in the foregoing action; that as such he makes this verification on its behalf; that he has read the foregoing Answer and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters which are therein stated on his information or belief and as to those matters that he believes it to be true.

ARTHUR HOLMAN

Subscribed and sworn to before me this 11th day of June, 1943.

[Seal]                      LOUIS WIENER

Notary Public, in and for the City and County of  
San Francisco, State of California. [26]

[Printer's Note: Copy of Policy No. 1687927, attached here as Exhibit A to the Answer, is set out in full at pages 7 to 19 of this printed record. Therefore it is not reproduced again here.]

(Receipt of Service.)

[Endorsed]: Filed June 11, 1943.

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District Court of the United States  
Northern District of California  
Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Tuesday, the 2nd day of November, in the year of our Lord one thousand nine hundred and forty-three.

Present: the Honorable Louis E. Goodman, D. J.

[Title of Cause.]

No. 22609-G Civil

This case came on this day for trial before the Court sitting without a jury. John J. Taaffe, Esq. appeared as attorney for plaintiffs, and Leo R.

Friedman, Esq. appeared as attorney for defendant. The attorneys having orally stipulated thereto in open Court, it is Ordered that this case be and the same is hereby consolidated for trial with case No. 22613-R, Zeila Barr vs. The Equitable Life Assurance Society of the United States. Thereupon the two cases proceeded to trial. Mr. Taaffe made a statement to the Court on behalf of the plaintiffs. Mr. Mackay made a motion for judgment in favor of the defendant The Equitable Life Assurance Society of the United States, which said motion was ordered denied. Mr. Friedman made a motion for judgment in favor of the defendant The Travelers Insurance Company, which said motion was ordered denied. Louis Nave, Le Roy H. Briggs, M.D., Malcolm H. Merrill, M.D., Monroe D. Eaton, M.D., and Karl F. Meyer, M.D., were sworn and testified on behalf of the plaintiffs. Mr. Friedman introduced in evidence and filed Defendants' Exhibit A. Ordered that the further trial of these cases be continued until November 3, 1943, at 10:00 o'clock A. M.

Minute Order Nov. 2, 1943. [36]



In the United States District Court for the Northern District of California, Southern Division

No. 22609-G

WILLIAM H. BARR, a minor, and AGNES D. BARR, a minor, by Zeila H. Barr, the guardian,

Plaintiffs,

vs.

THE TRAVELERS INSURANCE COMPANY,  
Defendant.

JUDGMENT AND ORDER  
OF DISMISSAL

The above entitled action (consolidated with the case of Zeila Barr v. The Equitable Life Assurance Society of the United States, No. 22613-R) having come on regularly for trial before the above entitled court, sitting without a jury, on November 2, 3, and 4, 1943, the plaintiffs being represented by John J. Taaffe, Esq., their attorney, and the defendant being represented by Messrs. O'Connor, Neubarth and Moran and Leo. R. Friedman, Esq., its attorneys, and on said last mentioned date, the plaintiffs having completed the presentation of their evidence and having rested their case in chief, the defendant moved the above entitled court, under and pursuant to Rule 41(b) of the Rules of Civil Procedure for the District Courts of the [37] United States, for a dismissal of the above entitled action on the ground that upon the facts

and the law the plaintiffs had shown no right to relief, and plaintiff having objected to said motion and the motion having been argued by counsel for plaintiffs and counsel for defendant and the same having been submitted to the court for decision and the court finds that said motion is meritorious and should be granted and that under the law and upon the facts and the law the plaintiffs have shown no right to relief;

It is hereby Ordered, Adjudged and Decreed and this court does hereby order, adjudge and decree that plaintiffs take nothing by reason of their complaint on file herein and that the above entitled action be and the same is hereby dismissed.

Dated: November 10th, 1943.

LOUIS E. GOODMAN

United States District Judge

Approved as to form pursuant to Rule 22 of the Rules of the District Court of the United States for the Northern District of California.

KEITH R. FERGUSON

JOHN J. TAAFFE

Attorney for Plaintiffs.

[Endorsed]: Filed Nov. 10, 1943. [38]

In the Southern Division of the United States  
District Court for the Northern District of  
California

No. 22,613-R

ZEILA BARR,

Plaintiff,

vs.

THE EQUITABLE LIFE ASSURANCE SOCI-  
ETY OF THE UNITED STATES,  
Defendant.

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No. 22,609-G

WILLIAM H. BARR, a minor, and AGNES D.  
BARR, a minor, by ZEILA H. BARR, their  
guardian,

Plaintiffs,

vs.

THE TRAVELERS INSURANCE COMPANY,  
Defendant.

Before: Hon. Louis E. Goodman, Judge.

Counsel Appearing:

For the plaintiffs:

John J. Taaffe, Esq.

For defendant Travelers Insurance Company:

Leo R. Friedman, Esq.

For defendant Equitable Life Assurance Society:

Pillsbury, Madison & Sutro, by

Harlow Rothert, Esq., and

William H. Mackey, Esq. [41]

Tuesday, November 2, 1943

10:00 A. M.

OPENING STATEMENT ON BEHALF  
OF THE PLAINTIFF

Mr. Taaffe: May it please your Honor, these actions were instituted by the wife and by the two minor children of the deceased, one Dr. Arthur Barr, a dentist, who resided and practiced his profession in San Rafael in Marin County, under the double indemnity provisions of two insurance policies, one issued by the Equitable Life Assurance Society of the United States, and the other by the Travelers Insurance Company.

We expect to show in this case, may it please your Honor, that Dr. Barr, up until a few days before his death, was a perfectly healthy, in fact an extraordinarily fine specimen of physical manhood; that on the 27th day of May of last year, he, his brother, and another gentleman, who was a witness, went to the northeastern portion of Lassen County, California, antelope hunting; that they remained in that vicinity for three days. They killed two antelope, having had permits from the State and Game Commission for that purpose, and on the 31st day, I believe it was, of May of last year, on their way home they stopped in Reno, went to an auto court of Reno to bathe, and while they were in that auto court the deceased called the attention of one of his friends who was present, that is, a gentleman other than his brother, to the fact that a tick had bitten him and had

imbedded itself in his abdomen. That was along about one o'clock in the afternoon.

About nine o'clock that evening, while the deceased and this friend were lying in bed or on the bed reading a paper, the friend called attention to the deceased, or the deceased called his attention to the fact that there were spots that looked somewhat like measles, principally upon the wrist and under the arm of the decedent. The decedent at that time [41-a] attributed the spots to nervousness only and dismissed the matter, or both parties dismissed the matter at that time.

We then expect to show, may it please your Honor, that on the following day, Monday, June 1, I believe it was, he got up at two o'clock in the morning and went fishing in the Lake Tahoe region, making an appointment to see his brother and friend about eleven o'clock in Truckee. They drove to Truckee and met him at eleven o'clock, picked him up in the machine, and that afternoon they returned home.

About five o'clock that evening he arrived to his home, at which time there were present his wife, his mother-in-law, and another lady, a friend of the family, and before taking a shower, he called their attention to a rash on the calves of both legs, pulling up both of his trousers, his long underwear, and showing them the rash.

The following day, which was to say, June 2, I believe was the date, he came over to San Francisco to do some shopping and did some shopping, and also to call on Dr. Briggs for a general check-



up, Dr. Leroy Briggs. He had not complained at any time in his life from any illness up to this point. He was complaining of no illness of any kind, but Dr. Briggs gave him a general check-up, among other things taking his temperature. His temperature was perfectly normal. His heart action was strong, and he found him in every particular to be healthy.

He returned home on that night, Tuesday, June 2, and went to bed. The following day, Wednesday, June 3, he went to work, to his offices, performing his duties as a dentist throughout the day. He came home Wednesday evening at approximately the usual hour, around six o'clock, and at that time made his first complaint about not feeling well. Those present noticed the [41b] flushed condition of his face. He did not eat any dinner, ate only a few bites of dinner, I should say, and went to bed.

The following morning, Thursday morning, he did not arise at his usual hour and his wife, because he was ordinarily a very early riser, and because he had not arisen when eight o'clock came around, went to his bedroom and asked him how he felt and if he was going to work. He said no. He was very confused or rather confused in his answers.

As we contend, the germs introduced into the system, or the bacteria, by the tick bite were beginning to show their first effects. She called first Dr. Briggs' office to advise him of his condition. He had left for the East overnight. She then called

in Dr. Marston of San Rafael. Dr. Marston examined him, found him confused mentally, and then gave certain advises which were carried out.

He progressively became worse during this day, Thursday. That afternoon, upon a phone call from the now widow, Dr. Marston again called, immediately ordered him hospitalized, and he was taken to the Cottage Hospital in San Rafael by ambulance.

Thursday afternoon he became progressively worse, went into complete delirium, completely uncontrolled shouting, screaming—out of his head entirely. He was given blood transfusions and other attentions, and on the following night, that is, Friday night, or I should say, Saturday morning, after being in the hospital less than forty-eight hours, four a.m. Saturday morning, he passed away.

We expect to show, may it please your Honor, that the district in which they were hunting in Lassen County is infested with *Dermacentor andersoni*, as it is called in [41c] technical medical terms, or the tick which carries microorganisms which react in this manner infested that area.

We expect to show that after his death, his wife took his clothing and put it away or sent it to the cleaners and another tick fell off the clothing, and that that tick was sent to the University of California for identification, that it was identified as a *Dermacentor andersoni*, as it is called.

We expect to show that he was embalmed be-

fore an autopsy was performed by doctors representing the insurance company and doctors representing his family when they made claim for double indemnity. Specimens of his tissue were submitted to disinterested doctors, scientists connected with the University of California, and they found in the lung organisms which are known in medicine as Rickettsia bodies, Rickettsia bodies being the micro-organisms which are transmitted from a tick from the region that we speak of in Lassen County to human beings, which affect human beings, and which cause death.

We expect to show that his death was typical of a tick infection.

We expect to show that the autopsy revealed him to be in other respects perfectly healthy—in fact, a very powerful and strong individual, but that these Rickettsia bodies had invaded his lungs, causing an infection of the lungs, resulting in what is known in medical as well as ordinary parlance as a bronchial pneumonia of the so-called atypical as distinguished from typical type; in other words, a virus type of pneumonia because of the fact that the tick communicates a virus and kills human beings by the transmission to the human being of the virus.

We expect to show that prior to his death the attending [41d] physician notified the State Board of Health of the State of California of the fact that he was attending a tick-bite case; that after this, the representative of the State Board of

Health called at a laboratory conducted by the sister of the attending physician and secured specimens of the decedent's blood which had been taken prior to his death; that those specimens were subjected to two different types of tests; that the blood was injected by one of the doctors connected with the State Board of Health into rats, and that other specimens of the blood were injected into guinea pigs, and that agglutination tests were made for the discovery of what is known as Proteus in the medical profession, and that those tests were negative. We expect to show it was more or less expected that they would be negative because the disease progressed so rapidly and killed him so fast that sufficient time had not elapsed during the course of the disease to get proper specimens.

We expect to show as a matter of law that a tick bite, or, rather, an insect bite for that matter is an accident in the meaning and terms of insurance policies of this kind.

The Court: Isn't the term in the policies "accidental means"?

Mr. Taaffe: Yes. I can give your Honor the exact language of the policy.

The Court: It is not important.

Mr. Taaffe: I do not think there will be any dispute on the law of the subject. There isn't any question about just what the law is in that regard. Having shown these facts, if your Honor please, we hope to obtain the recovery provided for, an

additional indemnity of \$10,000 in each case in favor of the widow and the two minor children.

[41e]

The Court: Are you going to have some evidence to the effect that there have been cases where these tick bites produced a virus?

Mr. Taaffe: No question about that. That will be beyond dispute.

The Court: I suppose the question in dispute is whether the man died from pneumonia or whether from a tick bite, to put it colloquially.

Mr. Taaffe: I personally do not think there will be any dispute that he died from what is called an atypical pneumonia.

The Court: Regardless whether the tick bite caused it or not?

Mr. Taaffe: That is right. We expect to prove that a tick bite caused that very condition.

There is one situation I would like to explain to your Honor before we go further. It does not involve the issues. As your Honor can readily see, numerous doctors will be called, and while ordinarily I do not attempt to suit the convenience of witnesses to the possible discommode of the court, doctors, as your Honor knows, in these times, are extremely busy.

The Court: Yes, I understand that.

Mr. Taaffe: I have tried to schedule their appearances here so they would not be greatly inconvenienced, and if the Court hasn't any objection to it—I know counsel on the other side will not—we will extend the same courtesy to them if



it becomes necessary. We may have to do two things. We may have to put on some proof out of order on that account, or we may have to call witnesses from the stand, or it may even result in our asking a short delay to produce a doctor in a [41f] given time.

The Court: You gentlemen can agree on everything else except the medical question, can't you?

Mr. Taaffe: That is it. I do not think there is any dispute about it.

The Court: What is the necessity about making any preliminary proof in this case?

Mr. Mackay: As to what? [41g]

The Court: Do you gentlemen agree that the only question in the case is the medical question?

Mr. Rothert: I do not think we could, your Honor. On behalf of Equitable I would say that we have in effect filed a general denial and we dispute the fact that this man was bitten by an infected tick, and we intend to prove by medical testimony that his death did not result from the injection of any rickettsial bodies or tick bite.

The Court: Then there are two issues in the case: First, whether he was bitten by the tick, and, second, whether it caused his death.

Mr. Rothert: Whether the tick was infected, and, third, if he was bitten by such a tick, it had any connection whatsoever with his death.

The Court: There is nothing else disputed in the case?

Mr. Rothert: There is one other issue, which is one of law, and which we would like to raise,

your Honor, and I might as well raise it now on the basis of counsel's opening statement.

The complaint in the action against Equitable has annexed and incorporated as a part of the complaint a copy of the policy, which contains a clause to the effect that there shall be no recovery of the double indemnity in the event that death results directly or indirectly from disease. Counsel himself in his opening statement has said that the cause of death was a disease, namely, virus pneumonia or, as he calls it, atypical pneumonia, and even if it were conceded for the [42] purpose of argument that the man had been bitten by a tick, and by an infected tick, and even if it were proved to your Honor's satisfaction that a pneumonia could result from transmission of rickettsial bodies by a tick bite, although on the other issues I believe we will show that that is unknown in medical science, still we believe that the case would, so far as Equitable is concerned, be within the exception which is set forth in the policy, and so for that reason at this time I move for judgment on plaintiff's opening statement.

The Court: Doesn't that raise——

Mr. Rothert: Death resulted directly or indirectly from the disease.

The Court: I think I have heard of some of these cases where, for instance, the question is whether there is a traumatic causation of a coronary occlusion. I think there is some divergence of opinion among the doctors on that. Disease follows a blow, and the question arises whether that

comes within the terms of the accident policies. Is there any law on that, as to whether or not you would be liable on the policy if there was an accidental bringing about of a disease due to a virus or germ?

Mr. Rothert: I do not think law is in a settled state on that issue. I think the question is pro and con.

Mr. Taoffe: I can give your Honor law on it as to the direct contrary, that they would be liable.

The Court: I will deny the motion at this time.

Mr. Friedman: May it be considered that the Travelers Insurance Company made the same motion?

The Court: Very well. I take it you won't have any formal proof in this case. You are limiting yourself to the issue [43] whether or not the decedent was bitten by the tick and whether the tick was infected, and whether there is liability under the policy.

Mr. Friedman: Yes. I think the sole issue is whether this man died by accidental means, and as to all the preliminary proof as to the issuance of the policy and compliance with its provisions, I do not think we have to waste time going into. The policies are set out in the answer.

Mr. Taaffe: The premiums were paid; you will agree to that?

Mr. Friedman: Yes, so far as I am concerned.

Mr. Mackey: Yes, we will agree that the policy was duly issued and in force with premiums paid. I regret somewhat I am not in a position to admit

that due proof of loss has been furnished with respect to death by accidental means.

The Court: Was the ordinary insurance paid?

Mr. Taaffe: Yes, your Honor.

Mr. Mackey: \$20,000 in both cases.

Mr. Taaffe: When you say you regret, Mr. Mackey—if your Honor will pardon me—that you can't concede or stipulate that due proof of death was given, I take it you were directing your remark only to proof of death within the double indemnity provisions; is that correct?

Mr. Mackey: Yes. I intended to express myself that way.

Mr. Taaffe: It is conceded or stipulated that proof of death was given?

Mr. Mackey: That is right.

Mr. Taaffe: And that those proofs of death contended that he died as a result of a tick bite; that is correct, isn't it?

Mr. Mackey: I do not think I can concede that.

The Court: Isn't that a matter of writing? [44]

Mr. Rothert: Yes, it is attached to our answer, your Honor.

The Court: Let us not waste time on technicalities. Does the proof of claim set forth what Mr. Taaffe said?

Mr. Mackey: As I recall, a photostatic copy of the proof of claim is set forth in the answer and states he died of virus pneumonia, and there is some statement to the——

The Court: Were you given notice that there

was some claim of a tick bite being responsible for this?

Mr. Mackey: The proof is made, your Honor, on a form, which at 6(a) commences with the following question: "What was the immediate cause of death?" and the answer given by the beneficiary was: "Acute bronchial pneumonia."

Now, at a later question, in answer to the following specific question: "Was death due to suicide, homicide or accident?" the answer is: "Unknown."

Mr. Taaffe: The word "accident" is underlined there, isn't it?

Mr. Mackey: Yes.

Mr. Taaffe: "If due to accident, describe the same fully." The answer to that question was: "Was bitten by a wood tick about 5/31/42 in an area that has reported Rocky Mountain spotted fever." That is the full extent of the notice.

The Court: The proof of claim is attached to the answer?

Mr. Taaffe: Yes.

The Court: And may be considered in evidence?

Mr. Taaffe: Yes, your Honor.

Mr. Mackey: Yes, it may.

Mr. Taaffe: Then, in addition to that, one more aspect of that—if we may be pardoned—it will clear up and [45] shorten matters—I take it both insurance companies will concede and stipulate that the plaintiffs in these cases consented to an autopsy being performed upon the body of the



deceased for the purpose of ascertaining the cause of death; that is correct, isn't it?

Mr. Mackey: That is correct.

Mr. Friedman: That is correct, and that the autopsy was performed, and that both the beneficiary and the insurance companies had their own medical representatives there; is that correct?

Mr. Taaffe: That is correct.

The Court: I guess you can go ahead, Mr. Taaffe, with the testimony.

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### LOUIS NAVE

called for the plaintiffs; sworn.

The Clerk: Please state your full name to the Court.

A. Louis Nave.

### Direct Examination

Mr. Taaffe: Q. Your name in full is Louis Nave? A. Yes.

Q. Where do you reside, Mr. Nave?

A. Novato.

Q. Novato, Marin County, California?

A. Yes.

Q. What is your occupation?

A. Garage owner.

Q. Your garage is located at Novato?

A. Yes.

Q. How old are you, Mr. Nave?

A. Fifty-two.

(Testimony of Louis Nave.)

Q. You are a man of family? A. Yes.

Q. Did you know Dr. Arthur Barr in his lifetime? A. Yes, I did.

Q. Do you know what his occupation was?

A. A dentist.

Q. How long had you known Arthur Barr prior to his death? [46]

A. Close to forty years.

Q. How old was Mr. Barr?

A. Pretty close to my age.

Q. You were both about the same age?

A. Yes.

Q. How well did you know Arthur Barr during that forty years?

A. Well, I knew him well enough that we went hunting pretty near every week and fishing all those years.

Q. Did you visit his home often?

A. Yes, quite often.

Q. He visited your home often, is that correct?

A. Yes.

Q. You knew all members of his family?

A. Yes, I did.

Q. You knew his brothers and sisters?

A. Yes.

Q. His mother and father? A. Yes.

Q. And he knew all members of your family?

A. Yes.

Q. Visited at your home frequently, is that correct? A. Yes.

(Testimony of Louis Nave.)

Q. Now, throughout the forty years, you have testified that you went hunting or fishing with him every week. Was he an addict of outdoor pastimes such as hunting and fishing?

A. You mean if he went hunting and fishing?

Q. Yes.

A. He practically lived in the woods.

Q. He practically lived in the woods?

A. Yes.

Q. For how long?

A. As long as I had known him.

Q. Were you a member of any hunting club with him?      A. Yes.

Q. What hunting club was that?

A. Lomalta Gun Club.

Q. Lomalta?      A. Yes.

Q. Where were the headquarters of that club located?      A. Lucas Valley.

Q. In Marin County?      A. Yes.

Q. For how long had you hunted with Mr. Barr in Lucas Valley in Marin County?

A. I would say about forty years.

Q. Did you hunt with him in other places besides Marin County?

A. Yes, we took trips. We hunted up at his brother's ranch in [47] Humboldt County; hunted up in Lassen County; Nevada; we went up in Idaho—different places.

Q. Did you fish with him frequently also?

A. Yes, we always fished.

Q. Where did you fish with him?

(Testimony of Louis Nave.)

A. Oh, we fished up in Humboldt, up the coast, for steelhead, bass fishing—wherever we found out there was any fishing, we would go.

Q. How frequently during the year would you hunt and fish with him? A. What?

Q. How often during the year would you hunt and fish with him?

A. Practically all the year round, when the season—even in the wintertime when there was nothing doing, we hunted varmints and coyotes.

Q. When you speak about hunting in the various localities and States you have mentioned, did you mean for the most part your hunting was confined to deer hunting? A. Yes.

Q. Did you also go duck hunting with him?

A. Yes, we have gone to the club.

Q. Where was the duck hunting club located?

A. We had several ones. We hunted for a good many years on the Foster property up at Bearfield. It is around Schellville, between Schellville and Reclamation.

Q. Did you hunt ducks in other regions with him?

A. Before he passed away we hunted ducks over at Grizzly Island.

Q. Did you also quail hunt with him?

A. Yes.

Q. Where did you quail hunt with him?

A. We hunted in the valley, up the coast around Marshall.

(Testimony of Louis Nave.)

Q. In Marin County?

A. Yes, mostly Marin County.

Q. Did you have an opportunity—answer this question yes or no—of observing his physical condition throughout the years [48] that you knew him?      A. Yes.

Q. What was his physical condition?

A. Well, it was good so far as I knew.

Q. Was the deer hunting strenuous?

A. Yes, sometimes. You have to walk.

Q. Was he able to engage in such strenuous hunting as deer hunting without discomfort?

A. I will say he was a good walker.

Q. He was a good walker?      A. Yes.

Q. Did he ever go in the brush? How was he in the brush?      A. Good.

Q. The quail hunting was likewise done——

A. That was all walking.

Q. All walking?      A. Yes.

Q. Did your deer hunting involve riding horse-back quite a bit also?

A. Later years we had horses. We always used to walk before.

Q. Your coyote and varmint hunting involved riding or walking?      A. All walking.

Q. How many miles a day would you cover in your coyote and varmint hunting?

A. It all depends. Coyote sometimes eight or ten miles.

Q. Over hills?      A. Yes.



(Testimony of Louis Nave.)

Q. Did Arthur Barr ever complain in your presence about being ill or unhealthy?

A. No.

Q. Was he, as far as you could observe, a strong, healthy physical specimen? A. Yes.

Q. What was his muscular development? Was it good or ordinary?

A. Oh, yes, he was a well built man.

Q. What is that?

A. He was a well built man.

Q. How about his muscular development?

A. Good. [49]

Q. Did you go on a hunting trip with him in the latter part of May 1942?

A. Yes, we were lucky to get a permit to go antelope hunting.

The Court: Would you speak up a little louder?

Mr. Taaffe: I do not think there will be any objecting to my leading the witness in this regard.

Q. The antelope season opened for the first time in California in 1942? A. Yes.

Q. And you made application for antelope permits, is that correct? A. Yes.

Q. And there were many more applications than there were permits, is that true?

Mr. Friedman: I do not think there is any question that they went antelope hunting, Mr. Taaffe. The fact that he was permitted by the Fish and Game Commission to go has nothing to do with the issues.

(Testimony of Louis Nave.)

Mr. Taaffe: There is no contention that they did not go antelope hunting in this vicinity?

Mr. Friedman: As far as I know they went hunting. Whether it was antelope makes little difference.

Mr. Taaffe: The antelope are confined only to certain areas in California, Mr. Friedman.

Q. Where did you go hunting with Mr. Barr?

A. Went up to Lassen County, up in the far northeast corner of Modoc and the Nevada line, a place called Cold Springs.

Q. Called what? A. Cold Springs.

Q. When you speak about the place known as Cold Springs, there is no community or town by that name? A. No, just the country.

Q. There is just a cold spring there?

A. Yes, the country. [50]

Q. What is the nearest town to the vicinity in which you were hunting? A. Ravendale.

Q. Ravendale is how far away from the place where you were hunting?

A. It is about twenty-two miles.

Q. Were you hunting on a ranch, or did you have your headquarters on a ranch that had any name or identification?

A. Yes, we hunted on the Davis ranch.

Q. Davis? A. Yes.

Q. The Claude Davis ranch? A. Yes.

Q. You spoke about the area or locality being in the northeast corner of Lassen County; is that correct? A. Yes.

(Testimony of Louis Nave.)

Q. How far from the Nevada border, approximately? A. Oh, around ten or twelve miles.

Q. And how far from the Modoc border?

A. About the same.

Q. Do you know what the altitude is in that vicinity?

A. Oh, I think it is around about five or six thousand.

Q. Will you describe the country there, what type of flora—that means what type of brush predominates in the country.

A. Oh, it is like all that country up there. It is all sagebrush, juniper, stuff like that.

Q. The sagebrush, of course, being a brush, the juniper being a tree; is that correct?

A. Yes, a scrub tree.

Q. It is desert country, in other words?

A. Yes.

Q. Did you hunt on horseback or afoot in that vicinity? A. Horesback.

Q. Will you state what type of wild animals inhabit that country?

A. Deer, antelope, and coyote is about all there is around there.

Q. What type of domestic animals, if any, range in that country?

A. Oh, horses, cattle, and some sheep.

Q. Is it typical desert cattle range?

A. Yes. [51]

Q. Was anybody else with you on that antelope hunting trip?

(Testimony of Louis Nave.)

A. Yes; his brother, William Barr.

Q. William Barr? A. Yes.

Q. Where did you make your headquarters and of what did those headquarters consist while you were in Lassen County on that hunting trip?

A. Where we slept out?

Q. Yes.

A. We have a cabin there on the Davis ranch where we stayed.

Q. How was that cabin equipped?

A. Oh, it is a new cabin built about four or five years. He built it for us especially. It has a stove in it, table, and beds to sleep in.

Q. Do you remember the day that you left to go on that antelope hunting trip, what day it was?

A. Yes, I think it was the afternoon of the 26th, I think it was; we went to Reno and stayed there, and we left the next day to go to the ranch.

Q. And when you say the 26th, do you mean of May 1942? A. Yes.

Q. How far is Ravendale generally or approximately from San Francisco?

A. Oh, I don't know. It generally takes about nine hours' driving—eight or nine hours' driving. I imagine around 350 miles, 375, something like that.

Q. According to your testimony, then, you would have arrived at the Davis ranch on the 27th of May, 1942? A. Yes.

Q. When did the antelope season open?

A. The 28th.

(Testimony of Louis Nave.)

Q. Of May. A. Yes.

Q. Did you hunt on the 28th?

A. Yes, we hunted on the 28th, 29th and 30th.

Q. Now, do you know, Mr. Nave, whether that country does or does not have any ticks?

A. No; in the fall when we were up there hunting, there was ticks in the deer. [52]

Mr. Friedman: May I have the answer read? I can't hear the witness.

The Court: Will you try to speak up a little louder?

The Witness: I said the deer in the fall had ticks on it and I paid no attention to it.

Mr. Taaffe: Q. How long had you been hunting up in that country with Mr. Barr?

A. About ten years.

Q. You had seen ticks on the deer in the fall that year, is that correct? A. Yes.

Q. Let me ask you this question: When does the deer season open in that vicinity.

A. It generally opens about the 16th of September.

Q. The antelope season, however, opened on the 28th of May, is that right? A. That year, yes.

Q. Are there numerous ticks or are there just small numbers of ticks in that country?

Mr. Friedman: I think that calls pretty well for the witness' conclusion. I will object on that ground.

Mr. Taaffe: Q. How many ticks have you no-



(Testimony of Louis Nave.)

ticed, or just state the condition of infestation of animals such as deer that you have seen up there with ticks.

A. Oh, I don't know. I never paid no attention to those things. See ticks on deer all the time. I know there is ticks on them; that is all. I never found out how many was on them.

Q. By the way, you have hunted, according to your testimony, for forty years in Marin County. Have you ever seen or heard or known or observed a case where any ticks in Marin County ever made anybody sick?

A. No, I had lots of them stuck in me, and everything else, but haven't paid any attention to them. [53]

Q. Have you taken lots of ticks off yourself in Marin County? A. Yes, lots of them.

Q. All through the forty years?

A. Yes.

Q. Have you seen Dr. Barr take ticks off of himself for forty years, Marin County ticks?

A. Yes.

Q. Have you seen numerous other persons take the Marin County ticks off of them?

A. Most everybody that hunts.

Q. Do you know whether the antelope in Lassen County carry ticks? A. Yes.

Q. Do you know whether the horses and dogs in that country carry ticks?

A. I never paid any attention. I never had any

(Testimony of Louis Nave.)

attention. I never had any occasion to notice whether they had any or not.

Q. Have you seen ticks on humans in the fall of the year up there in the deer season?

A. Well, yes, sometimes. They have ticks up there, too.

Q. Were some antelope killed by members of the three-man party you have described on that hunting trip?

A. Yes, there was two. Dr. Barr killed one and I killed one. Had only two permits.

Q. And you brought those antelope home?

A. Yes.

Q. You reported them to the Fish and Game Commission, is that correct? A. Yes.

Q. When those antelope were killed how were they handled? What was done with them first, how were they brought into camp, and so on?

A. Put on a horse.

Q. Before they were put on a horse was anything done?

A. Oh, yes, the insides taken out, dressed.

Q. Did Arthur Barr clean either of those antelope out?

A. Yes, he and his brother worked together on one, and me and another, a cowboy, were together on the other one. [54]

Mr. Friedman: I haven't the slightest idea what the witness said.

The Court: Can't you speak up?

(Testimony of Louis Nave.)

The Witness: I said Dr. Barr and his brother were present when Dr. Barr killed the deer, and Dr. Barr handled one——

Mr. Taaffe: Q. When you say “deer” you mean antelope?

A. Antelope—and a cowboy and myself handled the one I killed.

Q. Who was the cowboy present on that occasion? A. Norman——

Q. Norman Custed? A. Yes.

Q. A nephew of Mr. Davis, who owned the Davis ranch up there? A. Yes—yes.

Q. When the antelope was drawn, cleaned out—that is, the intestines taken out—that is what you mean by that? A. Yes.

Q. When that was done, how was the antelope handled?

A. We strapped him onto a horse and brought him into camp.

Q. Do you remember whether Dr. Barr led his horse into camp with the antelope on the horse?

A. No, walked.

Q. Walked in? A. Yes.

Q. How were the antelope brought back to Marin County from Lassen County?

A. Well, put it on my truck and brought him into Reno and put him in the ice house over night.

Q. And then taken from the ice house and brought back on the same truck? A. Yes.

Q. The following day. Now, did Dr. Barr, his

(Testimony of Louis Nave.)

brother William Barr, and yourself all ride in the same truck?

A. Yes, on one truck.

Q. A pickup truck, is that correct?

A. Yes.

Q. On what day did you finish hunting in Lassen County on that [55] occasion?

A. What day we hunted?

Q. What day did you finish hunting?

A. It was on Sunday the 30th.

Mr. Taaffe: May I interrupt at this time to inquire if Dr. Briggs is here?

The Court: Yes.

Mr. Taaffe: Might I have the witness step down?

The Court: You are excused for the present.

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### LEROY H. BRIGGS

called for the plaintiffs; sworn.

The Clerk: Please state your full name to the Court.

A. Leroy H. Briggs.

#### Direct Examination

Mr. Taaffe: Q. Where do you reside, Dr. Briggs? A. Residence or office?

Q. Residence.

A. The residence is No. 2365 Broderick Street, San Francisco.

Q. Your office is located where?

(Testimony of Leroy H. Briggs.)

A. 384 Post, the Fitzhugh Building.

Q. What is your occupation?

A. I am a physician.

Q. Entitled to practice your profession in the State of California?           A. Yes.

Q. Continuously for how many years, Doctor?

A. Since 1908.

Mr. Taaffe: I take it that Dr. Briggs' qualifications will be stipulated to?

Mr. Friedman: As a——

Mr. Taaffe: As a physician and surgeon.

Mr. Friedman: As a physician and surgeon, yes.

Mr. Taaffe: Q. Doctor, did you know Dr. Arthur Barr in [56] his lifetime?

A. Not until I met him professionally.

Q. When did you first meet him professionally?

A. On the 2nd of June, 1942. I am referring to my records taken at that time.

Q. Had you treated other members of his family professionally prior to that time?

A. I had seen Mrs. Barr previously.

Q. Will you state, Doctor, the circumstances under which you first saw Dr. Arthur Barr on June 2, 1942?

A. Dr. Barr came to me that day.

Q. To your office?

A. To my office, by appointment, stating that he had recently returned from a hunting trip and he wanted to be looked over. Apparently he was somewhat concerned about the fear of heart disease. He had told me that he had driven up to Lassen County and had some pain in the back on the way up, had



(Testimony of Leroy H. Briggs.)

hunted through that country for a number of days, and had come down.

Q. When you say "come down," you mean returned to his home?

A. Returned, yes. He had been in his office, I think, one day—this happened to be a Tuesday, the 2nd of June, as I recall—and he had no symptoms whatever owing to any illness. I thought the backache he had was due to back strain from the long ride, and on examination he was found normal in all particulars, and I told him he was perfectly healthy as far as we could tell; that any man who could do what he had done the previous ten days need not fear about his heart trouble.

Q. Did you take his temperature?

A. I did. It was normal—98.2 degrees.

Q. Did you make an examination?

A. I examined him from head to foot.

Q. How long would you say your examination took? [57]

A. An examination of that sort takes an hour. My secretary always allows an hour for a new patient.

Q. Did you examine his circulatory system at that time? A. I did.

Q. What did you find concerning that?

A. Not a thing. His heart was normal in all particulars. His blood pressure was perfectly normal. His arteries were soft.

Q. Did you have him disrobe in whole or in part, Doctor, for purposes of that examination?

(Testimony of Leroy H. Briggs.)

A. In whole, with the exception of his shoes. He left his shoes and socks on.

Q. Will you state what his physical development was as you observed at that time?

A. The note I made is that he was a healthy looking man, flushed face from exposure to sun, well nourished and developed.

Q. Are there any notes that you have before you of any significance, Doctor?

A. Not of any significance at all. He had told me that he thought he was allergic to various things and that he got rashes very easily, but there was nothing at all on his skin.

Q. You observed his skin for the purpose of determining whether there was any rash?

A. Yes; I have a note here that other than for the suntan, his skin was otherwise negative.

Q. By the way, Doctor, do you know whether dentists who are in the habit of using novocaine get novocaine rashes on occasion?

A. Well, I do not see how they could very well, because their fingers do not come in contact with novocaine. They suck the novocaine up in a syringe.

Q. Do they get itches from novocaine?

A. That I can't say, because, as I say, novocaine as used by a dentist or surgeon is handled through the medium of instruments, hypodermic [58] syringes.

(Testimony of Leroy H. Briggs.)

Q. Would you say from your observation, your examination, that he was a strong-appearing man, well muscled, well developed? A. Yes.

Q. As far as you were able to observe, perfectly healthy, is that correct?

A. He was perfectly well, and I so reassured him.

Q. Doctor, you stated that you examined him on a Tuesday; is that correct?

A. On June 2. When I looked up the calendar, it was on a Tuesday.

Q. You know now he was dead the following Saturday morning at four a.m.?

A. I know now. I happened to go East to a meeting, and on my return I found his record on my desk. I have a very alert secretary, and she had made some notes that on June 4 his wife telephoned to report he was quite ill with a temperature of 103, and wondered if anything was found in his examination—this is quoted—

Mr. Mackey: Could I interrupt to ask what date it was his wife phoned that his temperature was 103?

The Witness: My secretary has dated this June 4. I have no personal knowledge of that at all, as I was on the way East.

Mr. Mackey: Is the hour noted by your secretary?

The Witness: No. She was in from ten until the afternoon.

Mr. Taaffe: Q. I can tell you it was sometime

(Testimony of Leroy H. Briggs.)

in the morning after Dr. Marston visited the home, if that will help you.

Doctor, knowing now that he was perfectly healthy on Tuesday—I will withdraw the question.

What time on Tuesday did you examine him, morning or [59] afternoon?      A. Afternoon.

Q. Knowing that he was perfectly healthy on Tuesday afternoon and that he was dead Saturday morning, it is possible, Doctor, for a person to be perfectly healthy and still be in the incubation stage of some disease on Tuesday?

A. He could be healthy so far as any ill sign went. A man could be in an incubation period of pneumonia, say, or any of the acute infections, and if he had a normal temperature there would be no way by which you could tell. He had no specific complaints except this bachache which he had, which is a very frequent sign of infection, and which he had had some ten days before.

Q. He had had some ten days before?

A. Yes, on his way up.

Q. The fact is that he had gone to Lassen County on the 26th of May, according to his testimony, which would be about seven or eight days before; is that correct?

Mr. Mackey: Six or seven days. I think the correct date is the 27th.

Mr. Taaffe: No, they left on the 26th, arrived on the 27th, and began hunting on the 28th. That is the testimony.

(Testimony of Leroy H. Briggs.)

Q. Doctor, what do you mean by the incubation stages of a specific infection?

A. By a specific infection we mean an infection that is due to a definitely known cause, like the typhoid bacillus or the pneumococcus or one of the virus diseases. There is usually a period of varying length from the time the individual gets the noxious agent of pneumococcus or the typhoid bacillus—the particular virus—until the time that it becomes in sufficient quantity to give a person symptoms.

Q. Let me ask you this: If a person, by way of example, were suffering from an infection from a tick, such as Rocky Mountain [60] spotted fever, typhus, tularemia, or any one of the things that a tick can communicate, any of the rickettsial diseases, as a result of a transmission from a tick bite, on Sunday preceding your examination, could it be possibly medically, in your opinion, Doctor—

Mr. Friedman: If the Court please, we would like to object on the ground no foundation has been laid.

Mr. Taaffe: This will be connected up later.

The Court: He has not finished the question.

Mr. Taaffe: Q. Doctor, could a person who had been bitten by a tick, we will say, on the Sunday previous to your examination, a tick carrying a rickettsial-microorganism, be found by you or any doctor to be apparently healthy on the following Tuesday?

A. Of course, I am not qualified as an expert.



(Testimony of Leroy H. Briggs.)

Mr. Friedman: Pardon me. I desire to object on the ground——

The Court: I do not think it is necessary. The witness has said he could not qualify as an expert.

Mr. Friedman: I did not hear the answer. The acoustics are bad or my ears are bad.

The Court: It is difficult to get the witnesses to speak up. They seem to be afraid of this room.

Mr. Taaffe: Q. Let me put it this way; it will be all-inclusive then——

A. I am perfectly willing to answer that question if the Court and the opposing attorney would give me permission.

Mr. Friedman: Mr. Taaffe, isn't it a matter the Court will take judicial knowledge of that a person could have some sort of a disease and still a doctor won't know until a certain stage has been reached? That is a matter of common [61] science. I do not think you have to prove that.

Mr. Taaffe: If that is conceded, that is perfectly all right.

The Court: I think we can agree on that, can't we?

Mr. Friedman: As a general proposition that is true.

Q. As a matter of fact—may I interrupt, Doctor?—that is true of a common cold, isn't it?

A. Yes. It is true of practically all infections.

Mr. Taaffe: Q. May I see your notes, Doctor, for a moment? I think I have finished with you. I notice here, Doctor, a note to the effect that Dr.

(Testimony of Leroy H. Briggs.)

Barr at the time of the examination had the ordinary exanthema.

A. "Exanthema" means measles, chicken pox, and children's diseases. By "ordinary" we mean the milder ones. If he had had scarlet fever or diphtheria they would have been mentioned.

Q. You mean he had those——

A. In childhood.

Q. Concerning his habits you have noted that he was a good sleeper, according to the history of himself as he related it; is that correct?

A. That is correct.

Q. You have likewise noted that his digestion was perfectly normal except that occasionally certain foods gave him hives; is that right?

A. That was his statement, yes.

Q. You have noted also that his bowels moved fairly well but tended to be a little loose; is that correct?

A. If it is down there, those were the statements he gave me.

Q. You have also that he takes very little alcohol and no tobacco at all; is that the history he gave you?

A. That is the history he gave me.

Q. You have noted his weight to be around 180 pounds; is that correct?

A. If the record so states. [62]

Q. I take it that probably was the result of observation as well as case history?

A. I weighed him.

(Testimony of Leroy H. Briggs.)

Q. You weighed him?

A. I weighed him and his height was taken.

Q. Do you remember what his height was, Doctor?

A. It is on the record. It will follow his weight.

Q. Five feet nine.

A. That is with shoes.

Q. You have noted here that he came in for a going over— "Comes in for a going over." Is that what he told you as the reason for his presence?

A. Yes, that is the way he expressed the idea, that he had come in for a complete examination.

Q. You have also noted that he does a good deal of outdoor activity without the slightest symptoms.

A. By that I mean the heart symptoms. He wanted to make sure that his heart was all right.

Q. He did not say it had ever given him any trouble of any kind?

A. No, and in questioning him he had no shortness of breath and he had no pain in his chest or down his arm. He just had a severe hunting trip, and without any of those symptoms, naturally, I was reassured that his heart was sound.

Q. You have also noted that he was a healthy looking man and that is a fact, isn't it?

A. That is true; that is a fact.

Q. By the way, you have another note here that he was five feet nine inches tall and his weight 187 pounds. I take it 187 was noted from the actual weighing of him, is that correct?

(Testimony of Leroy H. Briggs.)

A. Yes; that is fully dressed. We allow ten pounds for a man's clothes.

Q. You found his pupils to be regular, equal, and react promptly to "l" and "a".

A. To light and accommodation. [63]

Q. His fundal arteries, you have noted, show no arteriosclerosis; that is a fact, isn't it?

A. That is a fact.

Q. What does that indicate, Doctor?

A. By the fundal arteries we mean the arteries that are on the retina, on the back of the eye. It is customary in diagnosis to look at the back of the eye because those arteries in back of the eye are a pretty fair index of the arteries of the brain.

Q. You have a note that his throat was red, his tonsils were in, and his tongue clean. Those are the facts as you know them, is that correct?

A. Those notes were dictated immediately after the examination.

Q. You then have a note that his neck was quite negative.

A. By that I meant that there were no enlarged glands, no scars; his thyroid was not felt.

Q. You next have a note that his heart and lungs were normal in all particulars, is that correct?

A. It is. I write it that way to avoid length of time in going into the details of it. The examination was made in considerable detail.

Q. What did you do, Doctor, for the purpose of determining that his lungs were normal?

(Testimony of Leroy H. Briggs.)

A. The technique of the examination of the lungs is to look at a man's chest, watch the movements on respiration, elicit what we call fremitus pertussit to see if his lungs are full of air, and then to listen with a stethoscope, and provided any two of those maneuvers show no abnormality, we say the lungs are negative or normal.

Q. His heart showed no enlargement, according to your notes here?      A. Correct.

Q. His blood pressure was 140 over 100; is that correct?      A. Correct.

Q. Perfectly normal for him?

A. At 51 years his diastolic [64] of 100 is a trifle high, but not considered abnormal.

Q. Hemoglobin was 95 per cent, is that correct?

A. That is the red coloring matter of the blood.

Q. Of what is that negative, Doctor?

A. The man does not have anemia.

Q. Who took his hemoglobin?      A. I did.

Q. What did you do for the purpose of ascertaining that hemoglobin?

A. The instrument I use is known as the Dare instrument. You prick the man's ear and collect an amount of blood in a pipette and that is compared with a color scale that reads in percentage of normal.

Q. What is the significance of a hemoglobin of 95 per cent?

A. A man with a hemoglobin of 95 per cent, as I say, is not anemic, and as far as his blood is concerned, is reasonably healthy, supposedly.



(Testimony of Leroy H. Briggs.)

Q. In connection with his urine, you have the note, "No sugar, no albumen, microscopical, negative." Are those the facts?

A. Those are the facts. In other words, a normal urine.

Mr. Taffe: I think that is all, Doctor.

The Court: Any questions, counsel?

### Cross Examination

Mr. Mackey: Q. Dr. Briggs, I take it when you stripped this man you examined the periphery of his body pretty carefully, did you?

A. Yes, sir.

Q. Did you notice the condition of his skin?

A. As I stated, his skin was normal except for the sunburn of his face.

Q. And by that you mean there was no evidence of any macular rash, petechial rash, or a rash of any kind?

A. The only mark was a scar of an abdominal operation that he [65] had had some fifteen years before.

Q. Did you examine the skin in the vicinity of the navel?

A. Yes, as I examined his body I would have noticed if there was anything out of the way there. I saw nothing of note.

Q. Did he make any complaint of having been bitten in that area by a tick?

A. No, he did not.

Q. Did he make any complaint to you about hav-

(Testimony of Leroy H. Briggs.)

ing suffered from a rash on his wrists and arms while on this hunting trip?      A. He did not.

Q. Have you ever seen a tick bite or lesion that is left by a wood tick?      A. Yes.

Q. Did you see anything that was in the nature of such a lesion on his body?      A. No.

Q. In the vicinity of the navel or elsewhere?

A. No.

Q. Did you see anything in the nature of a lesion or a blemish of any kind in the deltoid area of this man?      A. Not that I noticed.

Q. You examined his skin carefully on all parts of his body?

A. Yes, the man was stripped. I looked him over, and I think if anything of note had been there I would have seen it.

Q. Am I correct in saying that after he described the activities of his hunting trip you made some such remark to him, "Well, after such a strenuous time you ought to feel sort of bad," is that correct? I know I have not used your exact language.

A. I don't recall it. I might have said that in relation to his backache, of which he had complained—a long automobile trip in a modern car is conducive to a certain amount of back strain.

Q. Did I understand you to say correctly that that backache is a possible evidence of infection?

A. It can be. [66]

Q. That he might have had some infection at that time?

(Testimony of Leroy H. Briggs.)

A. No, I think I can say positively no, because he had enough infection in his system—let us say a week before—to give him a backache, he would have had a fever at the time I examined him.

Q. I note you in your report state that his throat was red. What did you mean by that remark?

A. That it was a little deeper color than the normal pink of the throat. It did not impress me particularly at the time. We see it frequently in men who are smokers. Dr. Barr is not a smoker.

Q. Do you also see that frequently with people who are suffering from colds or bronchitis?

A. Yes.

Q. You spoke somewhat on direct examination in some diseases—and I think you said particularly pneumonias—that at times a condition of infection may precede the existence of any clinical signs?

A. Yes, I think that is true of nearly every infection. It is what we speak of as the incubation period.

Q. Did you state generally of infections that the incubation period is of some uniform duration?

A. Not uniform. I did not specify as to any length of time.

Q. Could you specify the usual incubation period of diseases generally?

A. Of the ordinary diseases, I would say any time from a day to a month.

Q. From a day to a month? A. Yes.

Q. Isn't it true, Doctor, that in virus pneumonias the picture of the chest disclosed by X-ray is

(Testimony of Leroy H. Briggs.)

far in advance of any symptoms that are shown externally by the patient or shown on examination with a stethoscope?

A. As you put the question my answer would be no. I think what you are trying to get [67] at, if the Court will permit, is that the picture given by the X-ray is more marked than the signs that are elicited in the examination of the chest. That is what you mean, I think. Signs are before every symptom.

Q. Isn't it common in cases of virus pneumonias that at the time you would get a picture of a chest condition you would be unable to hear any rales in the chest by such examination as you made?

A. In the first place, the man would not have had a normal temperature had he had a virus pneumonia.

Q. In other words, does a man with a virus pneumonia have an abnormal temperature during the incubation period?

A. He does not have a pneumonia in the incubation period.

Q. I take it you are of the opinion that a man could not have a chest condition demonstrable by X-ray without having a temperature at the same time?

A. He would not have a pneumonia under ordinary circumstances that would give him the X-ray picture of a pneumonia without having a fever.

Q. What is the pathology of a virus pneumonia?

A. Here again I am not sitting as an expert. I have not been qualified as an expert.

(Testimony of Leroy H. Briggs.)

The Court: I think that is right. I do not think counsel have the right, unless they employ the witness as an expert, to have him testify on expert subjects.

The Witness: It is a common tendency of attorneys, I have found, to do that—to get something for nothing.

Mr. Mackey: I did not intend to use the doctor any further in connection with his answers on direct examination, and he did speak about signs during the incubation period.

The Court: Just to a limited extent.

The Witness: I might say in explanation that there is a [68] difference between signs and symptoms. Symptoms are subjective and signs are objective.

Mr. Mackay: Q. The fact is, Doctor, that he had no rash?

A. Not that I discovered.

Q. Did you by any chance manipulate his skin or press it?

A. I felt the skin of his chest, the skin of his abdomen, and I felt the skin of his back, his genitals. You do that on examination.

Q. On applying pressure you saw no discoloration of any kind? A. No.

Q. Indicating anything abnormal in the area of the skin of his body? A. No.

Mr. Mackay: I think that is all.

Mr. Friedman: I have no questions.

Mr. Taaffe: That is all. Thank you, Doctor.



LOUIS NAVE

resumed.

Direct Examination

(Continued)

Mr. Taaffe: Q. I believe you have testified, Mr. Nave, that your actual hunting ended on June 30, is that correct, or, rather, May 30—is that correct?

A. Yes.

Q. 1942. Did you stay at the cabin at the Davis ranch until the morning of May 31?

A. Yes, we left in the morning for Reno.

Q. About what time did you leave the Davis ranch on May 31? A. Oh, about eight o'clock.

Q. In the morning? A. Yes.

Q. Where did you go when you left the ranch?

A. We went to Reno.

Q. And when you arrived in Reno what did you do? [69] A. We went to an auto camp.

Q. All three of you? A. Yes.

Q. And when you arrived at the auto camp what did you do?

A. We left the trailer there—I mean our stuff there—guns and stuff, and took the antelope over to the ice house.

Q. And returned to the auto camp?

A. Yes.

Q. When you got to the auto camp what did you next do?

A. We took—I went in and took a shave and took a shower, and I came back and put my clothes on. As I was putting my clothes on, why, a couple of ticks fell off.

(Testimony of Louis Nave.)

Q. By the way, how many rooms did you have, that is, did the party of three have, at the auto camp? A. Two rooms.

Q. Were those rooms adjoining each other?

A. Yes, just a door between.

Q. Was there a doorway between them?

A. Yes.

Q. How many beds were there in the two rooms?

A. Two double beds.

Q. Did William Barr occupy one of those rooms? A. Yes.

Q. Dr. Arthur Barr and you occupied the other room, is that right? A. Yes, we slept together.

Q. What kind of beds were in those rooms?

The Court: He said double beds.

Mr. Taaffe: Q. Was there only a single double bed in each room?

The Court: He said he and the doctor slept together. He did not speak up loudly. (To the witness): Won't you try to speak up louder?

The Witness: Yes.

Mr. Taaffe: Q. When you were putting on your clothes you saw two ticks fall off, is that true?

A. Yes. [70]

Q. To the floor? A. Yes.

Q. Did you notice those ticks particularly so you can describe them?

A. Yes. They are funny looking bugs. They looked like a ladybug. They got white spots on them.

(Testimony of Louis Nave.)

Mr. Friedman: Will you speak a little slower? They looked like what?

The Court: A ladybug, with white spots on them.

Mr. Taaffe: Q. Those bugs, so far as you know, did not bite you? A. No.

Q. What did Arthur Barr do after you had taken your shower?

A. Well, he said, after I told him about the ticks, "Well, I had better take a shower, too. Maybe I have some on me."

Q. Then what happened?

A. Then he took a shower, and when he was in the shower he said, "I have two of them, too. I have one stuck just above my navel."

Mr. Friedman: Just a moment. May I have that answer?

(Answer read.)

Mr. Friedman: I will ask temporarily that the latter part of this answer go out as to what Dr. Barr said as not responsive to the question. The question was, "What did you do then?"

The Court: The question was, "What happened?" Is that right?

Mr. Friedman: Well, what happened.

Mr. Taaffe: That objection that it is not responsive, as I understand the rule of evidence, is not good, if the answer be otherwise material. Of course, this answer is material.

Mr. Friedman: I will amplify my objection and move to strike out the latter part of the answer

(Testimony of Louis Nave.)

on the ground that the statement of Dr. Barr is self-serving.

Mr. Taaffe: In reply to that, if it please your Honor, [71] wherever a declaration of an individual concerning his condition, or what amounts now to a condition, although he did not know it at the time, and the physical condition involved is at issue, recitals of what he said are evidence and are admissible. The mere fact that it was said not to a doctor does not make the slightest difference.

Mr. Friedman: I am not sure it is admissible if it is said to a doctor.

Mr. Taaffe: If it is said to a doctor and the issue is his then present condition, it is admissible. I have never heard that point contested. Now, here we have a statement, "I have ticks on me." While he does not know at that time that a fatal disease is coming on him, yet it develops later that his death resulted from an infection as here presented, I submit that testimony is admissible.

The Court: Q. Did you see the tick on him?

A. Yes.

Mr. Mackey: Let the record show the same objection on behalf of the defendant Equitable Life Insurance Company and a motion to strike on the ground it is hearsay.

The Court: Your objection may be technically correct, but of what importance is it? The witness said he saw the ticks on the doctor. What the doctor said is of no importance.

(Testimony of Louis Nave.)

Mr. Friedman: May it be stricken, then, your Honor?

The Court: No, I will allow the answer to stand.

Mr. Taafe: Q. How many ticks did you see on Dr. Barr? A. One.

Q. Where was the tick when you saw it on him?

A. It was above his navel about a half inch, as I say, something like that.

Q. Buried in the skin, you say, about a half inch above his navel? A. Yes. [72]

Q. You have seen ticks buried in yourself and in other people for the last forty years?

A. Lots of them.

The Court: You do not mean ticks were buried for forty years?

Mr. Taafe: I mean the last forty years.

The Court: Q. You mean you saw them very often, is that it?

A. Yes.

Mr. Taafe: Q. Did I understand you to say that you saw this tick buried for some distance, for some length of itself?

A. The length of the tick?

Q. How far was it buried in him?

A. His head was stuck in there; just his back end was sticking out—about half of him, I imagine.

Q. About half of the tick? A. Yes.

Q. Did you help Dr. Barr to extract that tick?

A. No.

Q. Did you offer to help him extract it?



(Testimony of Louis Nave.)

A. Yes, and I just kind of kidded him, "Do you want me to help you take it out?"

He said, "No."

I said, "We don't know whether he is a left-handed screw or a right-handed screw," because he was screwed in.

I went out then, and he took it out himself.

Q. Do you know, Mr. Nave, from your own personal experience of hunting for the past forty years that some ticks will embed themselves by biting into a human being and then screwing themselves by taking a right-handed turn while others take a left-hand turn? Is that what you meant?

A. Yes.

Q. Is that what you meant by your remark to him? A. Yes.

Q. Did you see Dr. Barr take that tick or extract that tick from his abdomen?

A. No, I walked out of the bathroom. He [73] said he would do it himself and I walked out.

Q. Did you see the area immediately surrounding where that tick was embedded in his abdomen?

A. Oh, I just saw the tick there, just a little red there, a little pink—right around where it went in.

Q. How big was that red or pink spot around where the tick was embedded?

A. Oh, I don't know; a half of a dime, I guess, something like that.

Q. Was it swollen to some slight extent? That is, was it raised above the level of the surrounding skin slightly?

(Testimony of Louis Nave.)

Mr. Friedman: Why not allow the witness to describe what he saw?

The Court: Yes.

Mr. Taaffe: Q. Will you describe it with reference to other particulars, that is, the vicinity where the tick had embedded itself?

A. I saw the tick embedded halfway and there was a kind of a red spot around it like they always do, and that is all I seen. I walked out.

Q. What time of day, approximately, was it, Mr. Nave?

A. Oh, around one o'clock, something like that.

Q. When you saw the tick on him?

A. Yes, one, half past one.

Q. At that time did you see him disrobed, completely disrobed?

A. He was disrobed. He was in the shower in the bathroom.

Q. Did you notice any other blemishes, rashes or anything else on him that would attract your attention at that time? A. No, nothing at all.

Q. Later on that same day did you see anything upon the body of Dr. Barr that drew your attention particularly?

A. No, nothing at all until about nine o'clock that night. We [74] went to bed and we were laying in bed and we were reading, and he said, "Look at my arms."

I looked at them, and they looked like red spots. I said, "What have you got? Measles?"

He said, "I don't know."

(Testimony of Louis Nave.)

I said, "What is it?"

"I don't know. Nervousness, I guess."

That is all that was said.

Q. Was that in the same place, in the same auto court?      A. Yes.

Q. Nine o'clock this same day when you saw the tick on him, is that correct?      A. Yes.

Q. Where were the spots that looked like measles?

A. Well, he had his underwear on. The sleeves came up to here, and I just saw his arm. It was more around his wrist than it was up here (indicating).

Q. When you say he had his underwear "to here," you have indicated you mean his underwear came across his arms at the biceps; is that it?

A. Yes, came to here.

Q. Your hand is pointing to the middle of the upper arm, is that correct?      A. Yes.

Q. That is where his underwear went?

A. Yes, up to here—just a short sleeve.

Q. When you say that there were more of these spots that looked like measles along his wrist than further up on his arm, is there some comparison you can make to show us the difference between the number of spots on his wrist and those extending along his arm?

A. No; I didn't pay much attention to that, because I didn't know what it was. I asked him, and he said it was nervousness, and all I noticed was he had more down here [75] than up the arm.

(Testimony of Louis Nave.)

Q. After you went to bed at nine o'clock that night, when did you next see Dr. Barr?

A. Well, a friend of ours came in there and he wanted us to go fishing up at Lake Tahoe, and naturally, I didn't feel well and I said, "I don't think I will get up in the morning and go fishing." And his brother isn't much of a fisherman. He said, "I wish I didn't have to go along with this fellow." And he got up at two o'clock in the morning. The fellow came and got him and they went fishing at some stream up at Lake Tahoe. And they made some arrangement.

He said, "We will meet you in Truckee. That will save us coming back into Reno, and this other fellow can come in."

So we met him pretty close to twelve o'clock in Truckee.

Q. Met Dr. Barr?                    A. Yes.

Q. He got up at two?                A. Yes.

Q. And went fishing?

A. Yes, went fishing.

Q. The next time you saw him after he got up at two in the morning was somewhere between eleven and twelve in Truckee?                A. Yes.

Q. Then what did you do?

A. Had a drink, and then we got in the car and left for home in the truck.

Q. Did he complain about being ill or not feeling well at any time on the trip home?

A. Never said a word about anything. All he said, he was going down and get his examination

(Testimony of Louis Nave.)

the next day, "on account of my having trouble about a year ago." He said, "Maybe there might be something wrong with me. I will go down and get a checkup."

Q. With the exception of saying those spots you saw might be due to nervousness, the spots that you noticed on his wrists, [76] on that trip at any time did he complain about not feeling well?

A. No, he didn't say a word on the way home.

Q. Either on the trip, on the way home, or on the way there? A. No.

Q. Had you ever heard him complain in his lifetime about being sick?

A. No, nothing out of the way that I know of.

Q. Throughout the entire forty years that you knew him had you ever known him to be sick?

A. No, never been sick that I know of.

Q. What time did you arrive in San Rafael, Marin County, upon your return here after that trip? A. Oh, about seven o'clock.

Q. Seven o'clock. Will you consider that answer again? You left Truckee somewhere around twelve o'clock, you say? A. Yes.

Q. How long does it take to drive from Truckee to San Rafael?

A. Oh, I don't know; six or seven hours if you stop to eat or something.

Q. Did you leave him off at his home in San Rafael? A. Yes.

Q. Is that the last you ever saw him alive?

A. That is the last time, yes.



(Testimony of Louis Nave.)

Q. You heard, did you, a few days after your return that he was sick?      A. Yes.

Q. You offered yourself as a subject for a blood transfusion, is that correct?

A. Well, a friend of mine rung me up, the first time I knew anything about it. He said, "Stand by for a blood transfusion." Arthur was out of his head and very sick. That is the first time I knew he was sick.

Q. Did you report this episode concerning this tick as you observed it in Reno prior to his death to anybody at all?

A. Well, Mr. Grady rang me up and told me Arthur was sick, stand by, and I said, "What can be wrong with him?" [77]

Mr. Friedman: Just a moment. I am going to object to all this.

Mr. Taaffe: Q. Without giving the language or the conversation, did you report the tick episode as you observed it prior to Arthur Barr's death?

A. Yes.

Mr. Friedman: Objected to, your Honor, on the ground it is hearsay.

The Court: I will sustain the objection.

Mr. Friedman: I ask that the answer go out.

The Court: The answer may go out.

Mr. Taaffe: I think that is all.

#### Cross Examination

Mr. Friedman: Q. Let me ask you, Mr. Nave: You stated that you never knew, in the forty years

(Testimony of Louis Nave.)

you knew him, of Dr. Barr ever complaining about being ill; is that right?

A. It depends what you call ill. I know he had an operation for hernia. Of course, that could be sickness.

Q. Do you mean in all the time you have been fishing and hunting with him he has never said, "I don't feel so good today"?

A. Well, he might have had a cold or something like that.

Q. On this trip to Lassen County in May did Dr. Barr make any complaints to you on the way up about his condition? A. No.

Q. Did he tell you he had a pain in the back?

A. No.

Q. Didn't he mention he had any pains of the back at all? A. No.

Q. He never mentioned that at all to you?

A. No.

Q. And at the time you were in Lassen County did he mention the fact that his back had hurt him or was hurting him?

A. Well, I think after we rode about three days, something like that, he said, "My back is kind of tired riding in the saddle." [78]

Q. The first complaint he made to you was after he had actually been hunting and horseback riding for two or three days; that was the first time he mentioned his back? A. Yes.

Q. How many times had you and Dr. Barr been to Lassen County?

(Testimony of Louis Nave.)

A. Oh, I guess about ten years.

Q. And during those forty years of hunting throughout the State of California with Dr. Barr you had found during that period of time many ticks upon your body, had you not? A. Yes.

Q. Some of them had bitten you at times, is that correct? A. Correct.

Q. And I assume that during that period of time you know that Dr. Barr had found ticks on his body? A. Yes.

Q. And some of them had bitten him at prior times, is that correct? A. Yes.

Q. You knew when you went to Lassen County that there were ticks in Lassen County, didn't you?

A. Yes.

Q. Dr. Barr knew that, didn't he?

A. Yes.

Q. And, as you have testified, you had found ticks on deer that you had killed at times?

A. Yes.

Q. I do not know what you said about the dogs and horses. Did you hunt with dogs? A. No.

Q. You did not hunt with dogs at any time?

A. No.

Mr. Taaffe: Do you mean the Lassen trip?

Mr. Friedman: I am talking about the Lassen trip.

Q. All the years you had hunted and had ticks upon you and ticks had bitten you, you had never become ill from it, had you, from a tick bite?

A. Well, I have not badly, but—I mean where

(Testimony of Louis Nave.)

I had to go to bed or anything—but I have had sores.

Q. Outside of a sore made by the bite, you have never had any other effects made by a tick bite?

A. No. [79]

Q. And I assume that somewhere around May of last year, when you went to Lassen County, personally you did not pay much attention to ticks and tick bites, did you? A. No.

Q. That was just something that was going to happen or may happen on a hunting trip?

A. Yes.

Q. Was that Dr. Barr's attitude?

A. About the ticks?

Q. Yes.

A. We didn't talk about ticks. We always had ticks on us—never paid any attention to them.

Q. In other words, nothing unusual?

A. No.

Q. And nothing, in so far as you knew, to be afraid of? A. No.

Q. When you were in Reno and, as I understand it, in this auto camp, you were the first one to take a bath and shower? A. Yes.

Q. Was there only one shower for the two rooms? A. Yes.

Q. Just one shower for the two rooms?

A. Yes.

Q. And you occupied it first?

A. I took a shower first, yes.

(Testimony of Louis Nave.)

Q. You took a shower first. You did not see any ticks on your body? A. No.

Q. And after you took the shower you went back into the room to dress, is that right? A. Yes.

Q. And Dr. Barr then went into the bathroom?

A. Shortly after I put my clothes on.

Q. After you put your clothes on?

A. Yes, I put my clothes on, two ticks fell off, and I told him about it, and he said, "I had better get a shower, too."

Q. Wait a minute. Where was the doctor when you told him about the ticks?

A. About the ticks?

Q. Yes. A. In the bathroom. [80]

Q. That is what I say. When you came back to dress, Dr. Barr went into the bathroom?

A. Yes.

Q. And while you were dressing, these two ticks fell out of your clothes? A. Yes.

Q. Did you examine your clothes to see if there were any other ticks in them?

A. My clothes? No.

Q. After those two fell out, you did not look to see if there were any more there? A. No.

Q. But you did mention the fact that a couple of ticks fell out of your clothes? A. Yes.

Q. Although you said the fact that you got ticks on hunting trips was something you rather expected? A. What do you mean, "expected"?

Q. It is nothing unusual? A. No.

Q. It has happened to you for forty years?

A. Yes.



(Testimony of Louis Nave.)

Q. When you made that statement, then Dr. Barr was in the bath, and what did he say?

A. "When I get the ticks off my clothes, maybe I will take a shower, too. Maybe I have some ticks on me."

Q. Oh, I see. Dr. Barr had not started to take a shower yet when you found the ticks on your clothes?

A. No.

Q. He went in the bathroom after you made that statement?

A. Yes.

Q. And you continued to dress?

A. Yes.

Q. Then what did Dr. Barr say after that, do you recall?

A. Well, when he went in there he said——

Q. Wait a minute. What did he say?

A. What did he say?

Q. Yes.

A. He said, "I got two ticks on me, too."

Q. Where were you when he said that?

A. In the bedroom.

Q. In the bedroom?

A. Yes. [81]

Q. And he was in the shower?

A. Yes.

Q. So what did you do?

A. Then when he said, "I got one stuck above my navel," I went in there and I said, "Do you want me to help you unscrew it?"

Q. What did you go in there for?

A. Just to kid him.

Q. There was nothing unusual, was there?

A. Did you ever have a tick on you?

Q. No.

(Testimony of Louis Nave.)

A. Sometimes it takes two or three.

Q. Or any other kind of insect that I know of; possibly a flea now and then.

A. Sometimes it takes more than that.

Q. The doctor had taken ticks off his body many times?

A. I thought maybe he had one on his back, and I went to look him over.

Q. You went to look him over?

A. To help him out.

Q. Did the doctor look over your back to see if any were on you?

A. No, he didn't. I didn't tell him; he had one sticking on his belly.

Q. You went into the shower? A. Yes.

Q. What kind of shower was it?

A. Just a stall shower.

Q. Just a stall shower? A. Yes.

Q. You went in there and you looked at the tick? A. Yes.

Q. Or did you just look at the place where the tick was? A. No, I looked at it.

Q. The same kind of tick you found in your clothes?

A. I don't know if it was the same. It was a tick on there.

Q. Did it look the same as the one you found in your clothes?

A. Well, the one I found on me—one was spotted, one was a brown one.

(Testimony of Louis Nave.)

Q. I am asking you if it was the same kind of tick as you found on your clothes.

A. I don't know if it was a relative. [82]

Q. Did it look like it was the same kind?

A. Sure it did.

Q. But you did not take it out? A. No.

Q. Did you stay there while the doctor took the tick out? A. No, I walked out.

Q. Did the doctor say that he got the tick out?

A. Yes, he got it out himself.

Q. He told you so?

A. Yes. He said he took it out himself.

Q. He said he took it out himself?

A. Yes.

Q. What did you do with the two ticks you found in your clothes?

A. I didn't do nothing; just left them on the floor.

Q. Just left them on the floor? A. Yes.

Q. Didn't kill them? A. No.

Q. Just knocked them out of your clothes and left them there?

A. They fell off my clothes. I didn't knock them off.

Q. They fell off your clothes? A. Yes.

Q. What part of your clothing were the ticks in?

A. I don't know. Just had a brown suit on. I remarked to him, I said, "I never had this brown suit on when I am hunting. I guess I got them when I transferred the antelope from the truck to the ice house."

(Testimony of Louis Nave.)

Q. Do I understand these two ticks that you saw were not in your hunting clothes at all?

A. No.

Q. They were in your brown suit?

A. Yes.

Q. They were not in your underwear?

A. In my what?

Q. They were not in your underwear, undershirt or underdrawers?

A. The ticks were there?

Q. I said were they there?

A. No.

Q. They were not in your ordinary shirt that you wear?

A. No, on my suit. I got it off the bed.

Q. How long have you had that suit on?

A. When I left [83] the cabin.

Q. When you left the cabin in Lassen County?

A. Yes.

Q. In other words, you got out of your hunting clothes and put on your suit?

A. Yes.

Q. When you got to the auto court you found these ticks?

A. After I came back from putting the antelope in the ice house.

Q. You took the antelope out of the truck and put it in the ice house?

A. Yes.

Q. You came back to the cabin——

A. Took a shower.

Q. Took a shower?

A. Yes.

Q. Was your suit on or off when the ticks fell off of it?

A. My suit was off.

Q. You had taken your suit off?

A. Yes.

(Testimony of Louis Nave.)

Q. As a matter of fact, you did not notice the ticks until after you had taken your shower, isn't that right?      A. Yes.

Q. So when you started to put your suit on, you started to put this brown suit on, that is when the ticks fell off, is that right?      A. Yes.

Q. How long did you see them before they fell off?      A. How long did I see the ticks?

Q. Yes.

A. I seen it as soon as I picked up my suit.

Q. As soon as you picked up your suit you saw the ticks as they fell off, is that right?

A. Yes.

Q. You did not pick them up?      A. No.

Q. Didn't get down and look at them?

A. No. I looked at one on the floor. He had little white spots on him. That is when I referred to the doctor.

Q. Had little white spots on?      A. Yes.

Q. That tick was on the floor?      A. Yes.

Q. And you were standing up?

A. Well, sitting on the bed. [84]

Q. You were sitting on the bed?      A. Yes.

Q. Anyway, your eyes were at least three or four feet from the floor?

A. I didn't measure it. I don't know.

Q. You know how tall you are. You were about in the position you are now in, except you were on the bed?

A. Maybe I was putting on my shoes; I don't know what I was doing.



(Testimony of Louis Nave.)

Q. You were putting on your suit?

A. No, I picked up my suit. Maybe I was putting my shoes on. When I looked at the tick, I don't know what I was doing.

Q. When you looked at the tick, you do not know what you were doing?

A. No, I didn't keep track. I put my pants on, two shoes, and I seen the two ticks there, saw the color, what they were. I seen the white spots, and I spoke to the doctor about it.

Q. We will come to that. Did the ticks fall off your pants or your coat?      A. I don't know.

Q. Were you putting on your pants or coat?

A. My suit was on the bed. I picked up my suit. I probably threw it to one side of the bed there and put my pants on.

Q. Is that what you did, or are you just guessing as to what you did?

A. Well, I put my clothes on.

Q. I know that.

A. That is the way I generally dress; I put my pants on first and then my stockings and shoes on.

Q. When you put your pants on, the ticks fell off?      A. Yes.

Q. They fell off the pants?

A. They fell off my suit when I picked it up.

Q. They fell off when you were moving your suit?

A. Yes. I moved my suit over, grabbed my pants, and I seen these ticks fall off, and I grabbed my shoes, and I noticed what they were.

Q. You noticed what they were on the floor?

(Testimony of Louis Nave.)

A. Yes. [85]

Q. How big were they?

A. About as big as a ladybug—a little bigger than ticks down here.

Q. How big would you say they were? Have you any way of describing them?

A. Bigger than these ticks down here.

Q. I do not know how big the ticks are down here.

Mr. Taaffe: Maybe they grow bigger ticks in Marin County.

The Court: Q. Do you know what a chigger is? It is like a tick. They have them in Texas. You do not know what a chigger is?

A. No. It is something like a ladybug.

Mr. Taaffe: Maybe I can stipulate.

Mr. Mackey: We would like to know from the witness.

Mr. Friedman: Q. Let me ask this question: Here is a piece of paper and pencil.

A. I can't draw.

Q. Just draw a circle about the size of the tick you saw. A. I don't know.

Q. You looked at them. I am not asking you to draw a picture of a tick; just a circle which would be about as big as a tick.

A. I don't know how to draw it.

Q. I don't want you to draw a tick; just something that would be about the same size as the tick.

(The witness did as requested.)

(Testimony of Louis Nave.)

Mr. Friedman: About like that. I will ask that this be marked as an exhibit on the cross-examination of the witness.

(The document was marked "Defendant's Exhibit A.")

Mr. Friedman: Your Honor, I notice it is twelve o'clock.

The Court: This case may be continued until two o'clock.

(Thereupon a recess was taken until 2:00 p.m. this date.) [86]

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Tuesday, November 2, 1943—2:00 P. M.

Mr. Taaffe: May I call Dr. Merrill out of order now?

MALCOLM H. MERRILL

called for the plaintiff; sworn.

The Clerk: Please state your name to the Court.

A. Malcolm H. Merrill.

Mr. Taaffe: I think a stipulation is in order at this time concerning the blood about which this witness is to testify. I do not know whether we discussed it with you, Mr. Friedman, but Mr. Mackey and I discussed it. Rather than bringing Miss Marston, the laboratory technician who took the blood specimens of Dr. Barr, to the stand to testify preliminarily to the testimony of Dr. Eaton

(Testimony of Malcolm H. Merrill.)

and Dr. Merrill, I think it is agreeable that we stipulate that the blood specimens about which both Dr. Merrill now and Dr. Eaton after him are to testify were specimens of the blood of the decedent, Arthur Barr, taken on Thursday or Friday, June 4 or 5, 1942 by Theresa Marston, and that she kept those blood specimens in a refrigerator until they were turned over to the State Board of Health on June 12, 1942. Is that correct, as you understand it, Mr. Mackey?

Mr. Mackey: That is correct. I understood the whole blood was taken on the 5th. However, if that becomes material I suppose we may under the stipulation clear that up at a later time.

Mr. Taaffe: Yes, certainly; subject to check and correction, we can stipulate. I take it you are so stipulating, Mr. Friedman?

Mr. Friedman: I will so stipulate. [87]

#### Direct Examination

Mr. Taaffe: Q. Will you state your name in full, please? A. Malcolm H. Merrill.

Q. What is your occupation?

A. I am chief of the Division of Laboratories, California State Health Department.

Q. Are you a graduate of any school, Doctor?

A. School of medicine?

Q. Yes. A. What school of medicine?

Q. What school of medicine.

A. St. Louis University.

Q. Are you a physician and surgeon?

A. Yes.

(Testimony of Malcolm H. Merrill.)

Q. When you speak about being chief of the laboratories, those are the laboratories of the State Board of Health, are they?

A. That is correct.

Q. In other words, you are attached to and employed by the Board of Health of the State of California, is that so? A. That is correct.

Q. In what special capacity are you acting, if any, for the State Board of Health?

A. As chief of that division, Laboratory division.

Q. What are your duties generally in the capacity which you occupy, Doctor?

A. Supervision of laboratory work, State laboratory.

Q. Did you receive, Doctor, certain specimens of blood which purported to be, and which we are stipulating was, the blood of Arthur Barr, a resident of San Rafael, in the month of June 1942?

A. Yes, we did receive that.

Q. Do you have a recollection or a record of the date when you received that blood specimen?

A. We have a record of the date, yes.

Q. Can you consult your record and tell us the day? [88]

A. That was on June 12, 1942.

Q. What was the occasion, Doctor, of the procurement or receipt by the Board of Health of the specimen of the blood of Arthur Barr? What occasioned the investigation of that blood?

Mr. Friedman: Well, I think that is wholly



(Testimony of Malcolm H. Merrill.)

immaterial and I will object on that ground, your Honor. Whatever prompted anybody to send the blood to that laboratory, to this doctor, is not material. I think all that is material is that he received it and what he did with it.

Mr. Taaffe: Here is all I have in mind, if your Honor please: Certain duties are imposed upon departments such as the State Board of Health in connection with various matters, especially those matters which are the subject of their epidemiology department, that is, in connection with the possible spread of diseases and the like of that. Now, if it was in his official capacity, as a part of his duties, we have a right to show what occasioned it. Suppose, for instance, there were a widespread epidemic of one sort or another; wouldn't it be perfectly all right to ask a witness occupying an official position as Dr. Merrill does, "What occasioned your investigation of that particular disease?"

The Court: Wouldn't it depend upon what somebody told him?

Mr. Taaffe: The report that was made prior to the death of Dr. Barr to the State Board of Health.

The Court: Do you want to show that somebody on behalf of the decedent or the family presented a specimen to the Board of Health?

Mr. Taaffe: Dr. Homer Marston, if it please your Honor, who was the attending physician at the time of the death, reported it to the Board of Health. [89]

(Testimony of Malcolm H. Merrill.)

The Court: I do not suppose counsel will dispute that the attending physician sent a sample of the blood to the Board of Health?

Mr. Friedman: No.

Mr. Taaffe: It goes further than that, if your Honor will bear with me a minute. If your Honor remembers the line of interrogation pursued by Mr. Friedman this morning, and quite properly—he has a right to do it—but your Honor will remember his line of interrogation when cross-examining the witness Mr. Nave, he was asking Mr. Nave questions which I thought, at the time at least, were intended to discredit his testimony that Arthur Barr was bitten by a tick and that he saw the tick at that time. Now, if we can show reports to the State Board of Health at any time, especially prior to the death of Arthur Barr, of course, it would discredit any claim that——

The Court: You want to show that a report was made to the Department of Health that the doctor was sending the blood because of the fact that the man was bitten by a tick?

Mr. Taaffe: Right; exactly; that a report was made that there was in San Rafael a tick bite case.

The Court: You want to meet the defense that this was an afterthought, a trumped-up story?

Mr. Taaffe: Right, especially in view of the line of cross-examination pursued this morning.

Mr. Friedman: You can indulge in any conclusion you want with respect to the purpose of my cross-examination, but I want to add to my object-

(Testimony of Malcolm H. Merrill.)

tion that any testimony of the doctor on the stand as to why the blood was transmitted to him for investigation is hearsay and certainly declarations that are not binding upon either of these defendants in this case. [90]

Mr. Mackey: May I ask counsel, do you intend to show by the witness that an examination for tick-borne diseases was requested to be made?

Mr. Taaffe: No, only that Dr. Marston—I am only reporting what I expect to prove by the witnesses—Dr. Homer Marston informed me prior to the death of Dr. Barr he reported this case as a tick-bite case to the State Board of Health; that pursuant to his report a Miss Ames, I believe it was, of the State Board of Health, called at Miss Marston's laboratory in San Rafael and procured a specimen of blood.

The Court: Who is Miss Ames?

Mr. Taaffe: She is connected with the Board of Health. She came from the State Board of Health and procured the specimen of blood, and she turned that blood over to Dr. Eaton and she turned another portion of it, or Dr. Eaton did, to Dr. Merrill.

The Court: Dr. Merrill would only know what Miss Ames told him.

Mr. Taaffe: Pardon me?

The Court: This witness would only know what Miss Ames told him.

Mr. Taaffe: I do not know whether he was the one who gave her instructions. He would know

(Testimony of Malcolm H. Merrill.)

what Miss Ames told him, or he might have instructed Miss Ames.

The Court: Are you going to have Miss Ames here?

Mr. Taaffe: No, we have eliminated Miss Ames and Miss Marston by a stipulation that it was Dr. Barr's blood.

The Court: Are you going to have Dr. Marston as a witness?

Mr. Taaffe: Dr. Marston will be here tomorrow morning to testify, and he will testify he made a report of this to the [91] State Board of Health.

The Court: If you are going to have direct testimony of Dr. Marston that he did so report it to the Board of Health, it probably would not help very much to have this witness testify with respect to that matter unless he talked with Dr. Marston.

Q. Did you talk with Dr. Marston?

A. I did not, no.

Mr. Taaffe: Under the circumstances and your Honor's suggestion——

The Court: If that is your point, you can make it quite simply from the testimony of Dr. Marston, can't you?

Mr. Taaffe: I will prove it, then, by Dr. Marston, your Honor.

Q. You have already testified, I believe, Dr. Merrill, that you did procure a specimen of blood which purported to be, as is stated, and which we stipulated to be, a specimen of the blood of Dr. Barr on June 12, 1942?

(Testimony of Malcolm H. Merrill.)

A. We received such specimen.

Q. You received such specimen? A. Yes.

Q. From whom did you receive the specimen with which you performed your investigation later on?

A. I am not certain whether that came from Dr. Eaton or whether Miss Ames delivered that direct to the laboratory.

Q. It was one or the other?

A. It was one or the other.

The Court: Q. Who is Dr. Eaton? One of your colleagues?

A. One of my colleagues in the State Building.

Mr. Taaffe: He is in the courtroom, your Honor, I understand, and I am going to put him on next.

Q. Answer this question yes or no, please, Doctor: Did you make certain investigations concerning that blood? A. Yes, we did. [92]

Q. For what purpose? For what object or purpose?

A. For the purpose of attempting to determine the—to assist the physician in making the diagnosis of the disease.

Q. And the physician was who?

A. The physician's name on the card that came to us was Dr. Marston.

Q. Do you have that card?

A. I have the card, but there is a point of procedure I think perhaps that we should clear. Any records that we have in our State Health Department files are confidential records, and in my sub-



(Testimony of Malcolm H. Merrill.)

poena here, I was subpoenaed but there was nothing said about records, and in order to clear this matter, before the records are produced, I wonder if we could have, your Honor, a stipulation——

The Court: Q. Do you have the record with you?

A. I have the record with me.

The Court: You may produce it, then.

Mr. Taaffe: Q. Will you show me that record concerning Dr. Marston?

A. I have three reports that were sent back.

Mr. Mackey: Q. May I ask, Doctor, are the notes that you handed to counsel the ones that were made by Mr. Nicewonger?

A. That is correct.

Mr. Taaffe: Q. Doctor, what specimens or material did you receive, either from Miss Ames, Dr. Eaton, or anyone else, purporting to be those relating to this case of Dr. Barr?

A. Specimen of whole blood.

Q. That is all that you received, is that correct?

A. That is all that we received.

Q. When you made your investigation or experiment, what were you looking for?

A. We were looking for, in the first place, plague and tularemia, and, secondarily, the animals that were inoculated were followed for evidences of Rocky Mountain [93] spotted fever.

Q. What experiments did you make, Doctor, for the purpose of arriving at some determination in this matter?

(Testimony of Malcolm H. Merrill.)

A. Three lines of investigation were followed: The blood was cultured into culture media in an attempt to demonstrate any pathogenic bacteria that might be present. The blood stream was tested for its agglutinant activity against known cultures or known organisms, and laboratory animals, guinea pigs, were inoculated with the whole blood.

Q. The result of all those tests was what?

A. Our cultures were negative; our agglutination tests were negative; and our animal inoculations were negative.

Q. Did you know or understand at that time, Doctor, that those specimens of whole blood were taken on the 4th or 5th of June 1942?

A. The first information we had on it was the note from Miss Ames accompanying one of these forms which stated that specimens were taken on the 3rd.

Mr. Taaffe: I think it will be stipulated, counsel, it could not be taken earlier than the 4th?

Mr. Mackey: No, it could not. I could certify to that.

Mr. Taaffe: Is that correct?

Mr. Mackey: That is correct.

Mr. Taaffe: Do you know that to be the fact, Mr. Friedman?

Mr. Friedman: If Mr. Mackey says it is a fact, it must be correct.

Mr. Taaffe: I know it to be a fact also. The earliest date it could be taken would be the 4th, because Dr. Marston was not called in until the 4th.

(Testimony of Malcolm H. Merrill.)

Q. Would you please repeat your answer concerning known types of bacteria, or whatever your answer was with respect to what [94] you were looking for in this blood?

A. I stated we tested the serum from this blood with agglutination against known bacterial suspensions.

Q. And you did not get any positive results of any kind or character, did you?

A. That is correct.

Q. Now, this blood was taken on the 4th. The man died on the 6th. Nothing that you discovered in the blood would give any indication that he had any of the known strains of bacteria or disease in his bloodstream on the 4th, is that correct?

A. Our tests were directed only against those three conditions.

Q. Against those three?

A. And we had no evidence that any of those three were present.

Q. Did you find any other evidence of the presence of any death-dealing infectious element in the blood?

A. We looked for no other agents as that in the blood culture and we found no other organisms.

Q. In your blood culture you extended your examination beyond an investigation of evidences in the bloodstream of Rocky Mountain spotted fever, tularemia, and plague; that is correct, isn't it?

A. You mean if there had been other organisms there we would have found them?

(Testimony of Malcolm H. Merrill.)

Q. Yes.

A. Yes, if there had been an organism such as an outside organism or something of that sort, it should have shown up in the culture.

Q. Or any other organism that you regard as infectious or which might result in death; that is correct, isn't it?

A. No, I could hardly say that, because the culture technique used would not support the growth of all pathogenic organisms.

Q. Would the investigation have supported a determination with respect to any pathogenic organisms in addition to the three [95] you mentioned specifically?

A. I would say some.

Q. You found none of those?

A. None of those were found.

Q. In other words, so far as your determination was concerned, you found nothing that would indicate the cause of death; is that correct.

A. Yes, I think it is safe to say that is correct.

Q. Doctor, you are engaged in making laboratory determinations concerning blood specimens very often, to say the least; that is correct, isn't it?

A. That is correct.

Q. You know that the blood specimens in this case with which you worked were taken within a day or two after the onset of the disease; that is correct, isn't it, or at least that was your information, wasn't it?

(Testimony of Malcolm H. Merrill.)

A. That was the information we had, yes.

Q. Is a specimen that is taken that early after the onset of a particular disease expected to return a positive reaction?

Mr. Friedman: I object to that until he specifies which one of the three reaction tests he is speaking about, your Honor.

Mr. Taaffe: He can answer it with regard to any of them.

Q. With respect to any of these tests, Doctor, is a specimen taken within a day or two after the onset of the disease conducive toward a positive test or reaction?

Mr. Friedman: I am going to object on the ground it appears to me he is attempting to impeach his own witness.

Mr. Taaffe: Not in the least. I have produced a witness who investigated something. I wanted the Court to know all the facts. I did not intend to impeach him. I understand from what he has explained to me that his tests are inconclusive, one of the reasons being you should wait until the disease of this general nature has taken a course of eight or nine days [96] instead of one or two days.

Mr. Mackey: I think you are speaking about the agglutination test. I understand there is a distinction between the tests.

The Court: I will overrule the objection.

Mr. Taaffe: Q. Will you answer?



(Testimony of Malcolm H. Merrill.)

A. That question is directed with reference to those specimens, or is that with reference to my opinion as an expert in analyzing the material that comes?

Q. To these specimens here.

A. Will you repeat the question, please?

Q. The question generally was this, Doctor: Is a specimen which is taken a day or two after the onset of a disease such a specimen as ordinarily is expected to produce a positive reaction?

A. Some of the procedures that we use we would expect a positive reaction, yes.

Q. Which procedures do you refer to in that connection?

A. Cultures and the animal inoculations are the specific diseases for which we test it. It is limited to those.

Q. Is it or is it not a fact, Doctor, that one blood culture, or, rather, one blood specimen taken at one time will return a positive reaction and another blood specimen taken of the same subject at another time will return a negative reaction?

Mr. Mackey: Which experiment, please, counsel?

Mr. Taaffe: Any one of them.

A. Oh, there are varying factors: The factor of time in the disease is the important one, of course. There would be variation as the disease progresses.

Q. When you speak about variations in time influencing the determination, what do you mean by that?

(Testimony of Malcolm H. Merrill.)

A. I mean we would [97] expect to find organisms in the bloodstream at certain stages of the disease and not at others.

Q. At what stages of the disease would you expect to——

A. Which disease?

Q. Any one of the three diseases you mentioned: Rocky Mountain spotted fever, plague, and tularemia.

A. In Rocky Mountain spotted fever we would expect to find organisms in the blood stream the first week of infection.

Q. How early in the first week?

A. As soon as the acute symptoms begin.

Q. By "acute symptoms" you mean what?

A. As soon as the man really gets ill.

Q. Isn't it a fact in such cases you can often take a specimen and get a negative reaction from your first specimen, and then take a second specimen and get a positive reaction, taken at approximately the same stages?

A. There isn't anything absolute, of course, in it. But I say in general we would expect to find the organisms present early in the infection.

Q. Have you made any similar tests heretofore for the purpose of making determinations as to the existence of these three diseases?

A. Such tests have been made in the laboratory.

Q. Have you ever made them before?

(Testimony of Malcolm H. Merrill.)

A. Well, I have supervised tests on tularemia and plague, but not specifically in previous instances on Rocky Mountain spotted fever.

Q. Does the condition in which the blood is kept in the interim between the taking of the whole specimen and the receipt of that specimen and the performance of the experiment by yourselves have any influence on the accuracy of a determination?

A. Yes.

Q. What are the conditions under which the blood must be kept [98] in order to insure accuracy?

A. Well, there is not only the question of temperature; there is the question of time. In general, the lower the temperature the longer the agent will survive.

Q. In other words, your blood specimen must have what I believe I am correctly characterizing as viability; that is correct, isn't it?

A. The organisms, yes.

Q. The organisms must have life, in other words?

A. Yes.

Q. Time enters into the question as to whether they do or do not have life, is that right, Doctor?

A. That is right.

Q. Now, keeping in mind that in this case, Doctor, this specimen was taken on either the 4th or 5th of June and that you did not get this specimen until the 12th of June, would the interval elapsing have any influence on the possibility of getting a positive or negative reaction?

(Testimony of Malcolm H. Merrill.)

A. Well, the interval elapsing, regardless of what that interval is, would have an influence.

Q. What influence would it have?

A. Well, in general the organisms tend to die out after the specimen is taken.

Q. Do you regard seven or eight days as a rather considerable interval elapsing between the taking of the specimen originally from the subject and the beginning of the performance of your experiments or demonstrations as an unusual length of time?

A. It would depend upon how the specimen is taken or how the specimen is kept.

Q. This specimen was kept, we have stipulated, in a refrigerator. Now, keeping that in mind, would the lapse of seven or eight days have any possible influence on the possibility of success in your tests?

A. It would have an influence, yes.

Q. In other words, after the lapse of that length of time, [99] even though the specimen was kept in a refrigerator, the organisms might not be viable; is that the situation?

A. Well, they might not be, but, on the other hand, they might be.

Q. But you have no way of determining that?

A. Only by experience of others who have done a similar type of work.

Q. Can you make an experiment, Doctor, for the purpose of determining, exclusive of everything else, whether the organisms are viable, or do you make a determination in that regard solely and ex-

(Testimony of Malcolm H. Merrill.)

clusively upon the positive results that sometimes accrue?

A. Experiments could be devised to demonstrate the rate of loss of viability of a blood specimen with time.

Q. Nothing was done in that regard in this case?

A. Not in this case, because we received the blood late, that is, after the time interval you have mentioned.

Q. You do not know whether the organisms were then viable or non-viable at the time you received the blood specimen, do you?

Mr. Friedman: What organisms?

Mr. Taaffe: The organisms in the bloodstream.

Mr. Friedman: He said there weren't any of these three things.

Mr. Taaffe: Any organisms, I am speaking of.

The Witness: Oh, we know we did not demonstrate any viability.

Mr. Taaffe: Q. You did not demonstrate any. It is entirely possible, under all the circumstances that you know of concerning the taking of this specimen, that is, as to the time interval elapsing and the conditions under which it was kept, which have already been related to you, that all organisms [100] may have been non-viable in this case; isn't that correct?

Mr. Mackey: If your Honor please, I want to object to that question on the ground that this case



(Testimony of Malcolm H. Merrill.)

involves a burden of proof on the plaintiff. Now he is trying to prove it is not impossible that there may have been rickettsia in the blood.

The Court: I appreciate that, Mr. Mackey. It may be counsel has other evidence.

Mr. Taafe: Yes, I do, your Honor.

The Court: In and of itself it would only be in the nature of a negative support of a burden of proof.

Mr. Taafe: I could have let them put this witness on the stand. I knew they had him under subpoena, and I could have cross-examined on these questions. I sought to suit the convenience of this man, if it please your Honor.

The Court: Unless it is connected up, of course, or there is other evidence—it might be material if there is other evidence on this subject that is of more positive nature.

Mr. Taafe: I will produce evidence of the existence of rickettsia in live bodies, the rickettsia being what we are looking for here.

The Court: Let the testimony come in and it can be stricken out later or given the proper weight if there is no other testimony.

Mr. Friedman: If there is no other testimony it has no weight at all.

The Court: I was putting it in a little different manner.

Mr. Taafe: In addition I want to put in every

(Testimony of Malcolm H. Merrill.)

witness who knows anything about this case in any manner, shape or form.

Q. In your opinion, Doctor, do you regard the tests which you made as a conclusive determination as to whether there were or [101] were not the organisms of anything you were looking for in the blood in this case?

A. It is pretty difficult in a diagnostic test to say that any one is conclusive evidence. I would have to answer your question as "No."

Mr. Taaffe: That is all.

### Cross Examination

Mr. Mackey: Q. Dr. Merrill, did any one of these three tests that you conducted have as its object the determination of whether or not there were any of the bodies that cause virus pneumonia present.

A. None of the tests that we conducted in our laboratory, our branch of the laboratory, were for that purpose.

Q. You said with respect to the preservation of blood samples that you had done some reading on the effect of lapse of time and temperature conditions that attend the preservation. Have you formed any opinion from your reading as to how long specimens of blood may be kept on ice with the bodies, the rickettsial bodies therein remaining infective?

A. The rickettsial bodies of Rocky Mountain spotted fever?

(Testimony of Malcolm H. Merrill.)

Q. Yes.

A. Yes, regardless of the procedure used in maintaining the blood specimen or tissue specimen, whatever it is, the organisms tend to die out. The rate at which they die will depend upon the environmental conditions, the temperature being perhaps the most important factor.

Q. Assuming that the temperature is that of such a refrigerator as a pathological laboratory would maintain, would it be your opinion that the pathogenic qualities of any rickettsia that we assume were in such blood would have disappeared within seven or eight days?

A. From the limited proof in the published reports that have come to my attention, maintained in a [102] refrigerator a blood specimen has an initial high concentration of rickettsial bodies—by that I mean a thousandth of a cubic centimeter, being a minimum infective dose—such a blood maintained at our usual refrigerator temperature of 40° F. or a little below would appear to remain viable to the extent that at least a cc. will cause infection up to twelve days or two weeks, and if kept in a frozen state, I think there are some reports that it will retain its viability beyond twenty days.

Q. So that in any given case if you kept the blood on ice, and if that blood came from a human infection that was fulminating and violent, you would expect the rickettsia to retain their infective

(Testimony of Malcolm H. Merrill.)

qualities in so far as the guinea pigs are concerned for periods considerably in excess of seven or eight days?

A. If the material were kept continually cool.

Q. It was stipulated here that the blood was kept on ice from the time it was removed from the patient up until it was transported from San Rafael to the pathological laboratory.

A. May I qualify that a little further? It would be expected that there would be a decrease, a progressive decrease, even at that temperature in the amount of infective material present.

Q. But the fact is, isn't it, Dr. Merrill, that immune guinea pigs do not occur in nature?

A. So far as I know, guinea pigs are uniformly susceptible to Rocky Mountain spotted fever.

Q. Were these guinea pigs that were inoculated with Barr blood observed for scrotal reaction?

A. Yes, over a period of——

Q. When you have a guinea pig inoculated with what is known to be blood-retaining rickettsial bodies, what reaction, if any takes place in the scrotum of the animal?

A. There is swelling and edema. [103]

Q. And is that a rather highly susceptible organ of the guinea pig to such a reaction? A. Yes.

Q. It is contended by the plaintiff in this case that the insured, the decedent, was bitten by a tick at some time between May 28 and May 30—correct me if I am wrong in that respect, counsel——

(Testimony of Malcolm H. Merrill.)

Mr. Taaffe: Between what dates?

Mr. Mackey: May 28 and 30, inclusive.

Mr. Taaffe: 31st.

Mr. Mackey: I think the last day after hunting was the 30th.

Mr. Taaffe: The 30th, but the tick was actually seen on him on the 31st.

The Court: Yes.

Mr. Mackey: Q. Assuming that a patient from whom blood is taken were bitten by an infected tick at some time between the 28th of May and the 31st of that same month, and that he was taken to the hospital on the evening of June 4, and that he died from the effect of such tick bite at about four o'clock in the morning of the 6th—less than forty-eight hours from his introduction into the hospital—and that a specimen was taken, say, midway between the onset and death of his blood and continually kept under normal laboratory refrigeration until delivered to Miss Ames, who took it from San Rafael to the pathological laboratory in Berkeley; and further assuming that inoculations of that blood were made into guinea pigs, as you have testified, what reactions with respect to temperature and scrotal swelling would you normally expect to find?

A. Well, I would rather answer that this way: that if the rickettsia were present in a viable state with as much as [104] a minimum dose, we would expect to obtain scrotal swelling and an elevation



(Testimony of Malcolm H. Merrill.)

of temperature in the guinea pig within the observation period that we carried the animals.

Q. And what was the length of that observation period?      A. Two weeks.

Q. You would have expected under those circumstances to have scrotal swelling within the two weeks if there had been a violent rickettsial infection in the blood?

A. I said we would expect to find it if rickettsia had been in a viable state when we got the blood to the extent of there being a minimum infective dose present.

Q. What would you say with respect to the probabilities of the viability of the rickettsia that we assume were there?

A. It is difficult to arrive at an estimate of probabilities, because that particular type of experiment apparently has been done so infrequently, and all we can say is that the limited number of published reports indicate that the virus remains viable in whole blood up to certainly twelve days if it is kept constantly at ice-box temperature; that is, assuming there is a large amount there in the first place, and most of those experiments have been done on blood from laboratory animals.

Q. If you had a highly fulminating and violent case of spotted fever, would that indicate a large amount of rickettsia in the patient?

A. I think during the most acute stage of the dis-

(Testimony of Malcolm H. Merrill.)

ease we would expect to find probably a rather high percentage of rickettsia in the bloodstream.

Q. In fact, immediately after the onset you would expect to find more rickettsia in the blood than you would at a period some six or seven days later, would you not, Doctor?

A. Than six or seven days later; but there is some evidence to [105] indicate that it may be higher in the midst of the first week than it is initially; but that evidence, I do not think, is too conclusive. So I do not think from what I have noted published on the subject—I am not sure that it is too definite.

Q. In your opinion, in the later stages of the illness you would find the rickettsia, rather than in the bloodstream, in the tissues would you not?

A. Yes. It tends to disappear from the bloodstream toward the end of the first week of infection ordinarily.

Q. In your opinion you applied to this blood specimen the three standard tests that are known in science and used uniformly in science to detect the presence of rickettsial bodies?

A. Well, there are two standard tests that are used actually to detect the presence of rickettsial bodies.

Q. You used both of those, did you not?

A. That is right.

Q. And so far as your results of your experi-

(Testimony of Malcolm H. Merrill.)

ments were concerned, there was no showing that rickettsial bodies, pathogenic and guinea pig, were present in Dr. Barr's blood?

A. That is right.

Q. May I ask one more question, Doctor: The tests that you did make were not calculated to determine whether or not there were in that blood any of the bodies that ordinarily cause the so-called atypical or virus pneumonia?

A. Not the tests that we did in our branch of the laboratory.

Mr. Mackey: That is all.

Mr. Friedman: I have no questions.

#### Redirect Examination

Mr. Taaffe: Q. Doctor, I understood you to say that so far as you knew guinea pigs are uniformly susceptible to Rocky [106] Mountain spotted fever; do you remember using that expression—so far as you knew? A. Yes, I used that.

Q. And you also said from the limited number of reports that you read you believed organisms would retain their viability; do you recollect that answer? A. Yes.

Q. Now, Doctor, did you read any of the reports on this subject, that is, concerning rickettsial diseases, by Dr. Ludwig Anegstein and Madera M. Boettcher of the University of Texas?

Mr. Friedman: If the Court please, we object to that as impeaching his own testimony.

(Testimony of Malcolm H. Merrill.)

Mr. Taaffe: This is not for the purpose of impeachment. I am not attempting to impeach the man at all. I simply want to see if I can correct him on this proposition about the susceptibility of guinea pigs. He said so far as he knows. I want to find out what he means by that. Let me withdraw the question in the interest of expedition and to forestall controversy.

Q. What do you mean by the expression, Doctor, so far as you know guinea pigs are uniformly susceptible to inoculation of Rocky Mountain spotted fever?

A. I am basing that statement on statements that I have read in some of the articles concerning this disease.

Q. In those same articles have you also read, Doctor, that several guinea pigs have been inoculated with the same specimen or parts of the same specimen; some remained febrile and some became afebrile?

Mr. Friedman: Objected to as cross-examining his own witness.

The Court: I think that is true. I will sustain the objection. [107]

Mr. Taaffe: Q. Doctor, do those articles about which you have testified say that guinea pigs were susceptible?

Mr. Friedman: Same objection.

Mr. Taaffe: This is something brought out on

(Testimony of Malcolm H. Merrill.)

cross-examination, your Honor, and about which we did not ask him at all.

Mr. Friedman: Oh, yes, the cross-examination of Mr. Mackey was directed to your examination as to the conclusiveness of these tests.

Mr. Taaffe: He answered on cross-examination a question which we did not ask him—anything about the susceptibility or the uniformity of the susceptibility of guinea pigs to inoculation. We did not ask him that at all. He has given that answer, and whether he be our witness, or not, we are bound by that answer. We want to find out if the article also said some guinea pigs were exempt or immune.

Mr. Friedman: He is entitled to base his opinion on the articles that he read.

Mr. Taaffe: I can simply ask him to produce the articles, if it please the Court. All I am trying to do is to show this witness there is a contrary view in connection with it. If you have any objection to it, I will ask the doctor to produce the articles. I have done you people a favor in producing this man and putting him on as a direct witness.

Q. . Can you produce the articles which show that guinea pigs are uniformly susceptible?

The Court: Mr. Taaffe, you can produce another witness—the law is pretty clear on that—if you want to bring out and make the point that the doctor's testimony on the subject of the immunity of guinea pigs is not wholly correct; but I do not think



(Testimony of Malcolm H. Merrill.)

it would be proper to take your own witness, this [108] same witness, after that has been brought out.

Mr. Taaffe: All right. Let me put it this way. I think I have the right to ask this question.

Q. Doctor, can you produce any of the articles, or can you identify them, give us the name of them, and we can dispense with that—any of the articles that you speak of that show that guinea pigs are uniformly susceptible to Rocky Mountain spotted fever?

Mr. Friedman: Same objection.

The Court: I will allow the question.

Q. Can you answer that?

A. I can give the specific reference to the statement I had in mind.

The Court: All right; overruled.

The Witness: I can't do it right now.

The Court: You mean you will have to look it up?

The Witness: I may have it in a note or two here that I could look at.

(After examining documents) I can't put my hand immediately on the statement.

Mr. Taaffe: I know the doctor has to be back in Berkeley at three-thirty, so may I ask him this question and let it go at that:

Q. Will you communicate with me, Doctor, if you find any such article?

(Testimony of Malcolm H. Merrill.)

A. Yes. It is one of two or three articles. I do not recall exactly which one it is. And there is a statement by the author to that effect, and it was assumed that it was more than a minimum effective dose with which the animal was inoculated. In other words, if you get near the borderline of minimum effective dose, it is natural that some of the animals will not come down. [109]

Q. What was the dose that you employed in your dose here? A. One cc.

Q. What is the minimum effective dose, Doctor?

A. Well, it would depend upon how much virus there happens to be in the particular blood that you are testing, and that will vary from animal to animal and from case to case.

Q. Do you know whether or not the one cc. dose you used in this case was a minimum effective dose?

A. It wasn't in this case, because it did not effect the animals.

Q. It might have required a greater dose, is that correct?

A. It might have. In other words, if 10 cc. had been used it might have been positive, but we have no way of knowing that.

Q. Will you communicate that report to us if you lay your hands on it. A. Yes.

#### Recross Examination

Mr. Mackey: Q. It is a fact, Doctor, that doses a great deal smaller than one cc. have transmitted

(Testimony of Malcolm H. Merrill.)

the infection to guinea pigs in laboratory experiments?

A. Where the blood is immediately transferred from patient to animal.

Q. How small is that dose sometimes? What degree of minuteness may that dose approach?

A. In the case of guinea pig blood it can approach .001 cc.

Q. .001 cc.?

A. I do not know that it has been established in humans, however.

Mr. Mackey: That is all.

Mr. Taaffe: Q. That is where it is transferred directly from the patient to the guinea pig?

A. That is where it is transferred from a guinea pig to a guinea pig.

Q. From a guinea pig to a guinea pig?

A. Yes.

Q. Crossing——

A. Simply transmitting infection from one [110] infected guinea pig to a normal guinea pig.

Q. A transmission test? A. Yes.

Mr. Mackey: May I ask one more question?

Q. With the fact in mind, Doctor, the plaintiff's contention in this case is that the deceased died less than forty-eight hours from the onset from a tick bite—with that fact in mind, and the blood taken midway between onset and death in your mind, and with the admission that the blood was kept in a laboratory refrigerator from that time

(Testimony of Malcolm H. Merrill.)

until it was transported from San Rafael to your laboratory, what is your opinion as to the soundness of the particular amount of blood which you inoculated into the guinea pigs for experimental purposes?

A. You mean would I have expected to find it positive?

Q. Yes, from that size dose under those conditions and circumstances.

A. Well, I think it would be approaching the borderline, certainly, if we had expected it to be positive. It could have been, but it very well could not have been, too.

Q. In any event, the result of your experiments, whatever their value be, was to show that no rickettsial bodies were demonstrated by any of the three methods used?

A. In the blood at the time that we received it.  
Mr. Mackey: That is all.

Mr. Friedman: Q. Let me ask you this, Doctor: In view of all the facts you knew about this blood specimen and where it came from, the virus tests you did subject it to were at the time, in your opinion, sufficient to produce positive results provided these bodies were there?

A. Provided they were still there in sufficient concentration, but I could give no guarantee that they would have persisted and been there in sufficient concentration at that time. [111]

(Testimony of Malcolm H. Merrill.)

Q. Well, if a specimen had come from a person who was not infected with these rickettsial bodies, there would have been nothing in the blood that would produce positive results; isn't that so?

A. We would not have expected it.

Q. Of course not; but under the circumstances, you took those tests for the purpose of discovering whether these bodies were present or bodies that were connected with any one of these three things—plague, tularemia and Rocky Mountain spotted fever; is that correct?

A. That is correct, with the specimens that we had available for testing.

Q. Of course, and the tests that you did indulge in were those that you believed would produce positive results if there were bodies sufficiently present to produce a positive result?

A. Oh, yes.

Q. And upon getting a negative result under the circumstances you so reported back to the doctor; is that correct?

A. That is correct.

Mr. Friedman: I think that is all.

Mr. Mackey: That is all.

The Court: The Court will take a brief recess at this time.

(Recess.)



## MONROE D. EATON

called for the plaintiff; sworn.

The Clerk: Please state your full name.

A. Monroe D. Eaton.

## Direct Examination

Mr. Taaffe: Q. What is your occupation?

A. I am Medical Bacteriologist. [112]

Q. Are you officially connected with the State Board of Health in any capacity?

A. I am Director of the Research Laboratory of the State Department of Public Health.

Q. Located in Berkeley, California?

A. Yes.

Mr. Taaffe: I take it that the qualifications of Dr. Eaton will be stipulated?

Mr. Mackey: Yes, indeed.

Mr. Taaffe: Is that right, Mr. Friedman?

Mr. Friedman: Yes.

Mr. Taaffe: Q. Dr. Eaton, did you perform some experiments or seek to make certain determinations of a part of the same specimen of blood that was procured by Dr. Merrill, who preceded you on the witness stand? A. Yes.

Q. Specimens which purported to be the blood of Dr. Arthur Barr, is that correct? A. Yes.

Q. Of what did your investigation and experiments consist?

A. We inoculated three cotton rats into the heart, and one cotton rat intranasally.

Q. Anything else?

(Testimony of Monroe D. Eaton.)

A. We examined tissue sections from the case that were submitted to us by Dr. Carr.

Q. And what were the results of your various determinations? A. Which ones?

Q. First your injection of the rats.

A. Entirely negative.

Q. And what were the results of your examination of the tissue sections?

A. Do you want me to state what my opinion is as to what the pathology in this case was?

Q. Yes.

A. Well, the pathology was that of a virus pneumonia.

Q. What leads you to that conclusion, if you will explain?

A. Well, it is awfully hard to state this without using technical [113] language.

Q. We will probably ask you to explain the technical language. We won't understand it.

A. The character of the exudate in the lungs and the cellular action around the bronchi and blood vessels was very much the same as that which we see in other cases of virus pneumonia.

Q. Did you find any bodies that you were able to identify?

A. We saw no bodies we could identify positively.

Q. Did you see any rickettsia-like bodies?

A. No.

Q. Do you regard your determinations as conclusive, Doctor? A. Which ones?

(Testimony of Monroe D. Eaton.)

Q. Any of them.

A. Well, I think the pathology was very suggestive. It was very definite that the man had a pneumonia.

Q. A virus pneumonia?

A. Probably due to a virus.

Q. What is a virus?

A. Well, a virus is defined in the dictionary as a harmful or noxious agent. The term generally means a submicroscopical organism which is not cultivated in the ordinary media used for the demonstration of bacteria.

Q. Do you regard your investigation and tests with the rats as conclusive?

A. No, because we did not have the proper specimens for this sort of a test.

Q. In what regard did you feel they were improper?

A. We were interested in this case because it was reported as a virus pneumonia. We used these animals to demonstrate one of the agents which we believe causes virus pneumonia. Blood is not the proper specimen to use for those tests. We should have had sputum or specimens of fresh lung tissue, which we did not have.

Q. By the way, the specimens or sections of lung that were taken and submitted to you in this case showed evidence that [114] the body had been embalmed before the sections of specimens were taken?

A. We knew that.

(Testimony of Monroe D. Eaton.)

Q. You knew that had taken place?

A. Yes.

Q. When you say you should have fresh lung tissue, you mean to differentiate between lung tissues before embalming and lung tissue after embalming?

A. No, for the purpose of isolating the causative agent.

Q. In the absence of the section or specimen being fresh, as you have characterized it, would you regard your tests as conclusive?

A. Well, we did no animal inoculation with the lung tissue because of the fact that the body was embalmed, and therefore any evidence that would be in there would be dead and not transmissible to the animals which we inoculated.

Q. When you speak about the examination that you made of the lung tissue, you are speaking about microscopic examination? A. Yes.

Q. And that is all, I take it? A. Yes.

Mr. Taaffe: That is all.

#### Cross-Examination

Mr. Mackey: Q. The inoculation, Doctor, which you made in the cotton rats was for typhus and unusual rickettsial strains? Was that the purpose of your inoculation?

A. Partly; partly because the cotton rat, according to some of our previous experiments, is susceptible to the agent which causes virus pneumonia or primary atypical pneumonia.

(Testimony of Monroe D. Eaton.)

Q. What was in your opinion the result of your inoculation experiments?

A. The result was negative.

Q. And that was the result that you expect to get from a virus pneumonia case?

A. Ordinarily, so far as I know, the agent does not occur in the blood or, if so, only [115] transiently in some forms of virus pneumonia.

Q. Now, I understood you to say that a virus is an organism which is not visible under the microscope; is that correct?

A. That is the definition that is generally used.

Q. A rickettsial body, on the other hand, is a bacterium-like body which may be seen microscopically, is it not?      A. Yes.

Q. And you were not able, were you, to demonstrate any rickettsial bodies in your examination of tissues from Dr. Barr's body?

A. No, we didn't see any. We are not expert at doing that, however.

Q. Now, I believe you are engaged, are you not, in an examination of specimens from a rather large number of cases, fatal cases, that have been reported as those of virus pneumonia?

A. Yes, we have examined specimens from quite a few.

Q. And in which there was no history of any tick bite?      A. Yes.

Q. Did you find the pathology and the specimens from Dr. Barr to differ from those specimens which you examine in the ordinary virus pneumonia fatal case?



(Testimony of Monroe D. Eaton.)

A. Not essentially, no, in this type of rapidly fatal case.

Q. In other words, from your observations and experiments there was nothing which prompted you to believe that the cause of the pneumonia was rickettsial in nature? A. No.

Mr. Mackey: That is all.

### Redirect Examination

Mr. Taaffe: Q. You were looking for rickettsia in the light of the history of the case, is that correct?

A. That is one of the reasons we sent the blood to Dr. Merrill for guinea pig inoculations.

Q. And also one of the reasons why you examined the tissue [116] microscopically; that is correct, isn't it?

A. Well, we were not specifically looking for rickettsia in this case, no.

Q. Did you incidentally look for rickettsia?

A. Well, yes, we always look for bodies in a plasma of this large amount of nuclear cells which you see in the lungs of these cases, either rickettsia or other virus bodies.

Q. With the history of tick bite, had you found rickettsia would you have associated the tick bite with the rickettsia?

A. It would have been a very unusual case, because I do not know of any to my knowledge. There haven't been any cases of Rocky Mountain spotted fever that died in two or three days with a pneumonia of this type.

(Testimony of Monroe D. Eaton.)

Q. Have you read all the history of this subject or a good part of it?

A. Well, I have gone into the question of how frequently pneumonia occurs in rickettsia diseases, yes.

Q. And in rickettsial diseases pneumonia occurs very, very often; that is correct, isn't it?

A. Secondarily after the disease is full-blown.

Q. And, as a matter of fact, the patients die of pneumonia; that is correct, isn't it?

A. Yes, but the pneumonia is not necessarily due to the rickettsial disease. It may be a secondary bacterial infection.

Q. As a result of the invasion of the rickettsia primarily, is that correct?

A. No, I said all pneumonia from which people die following rickettsial infections, like typhus and spotted fever, may be due to bacteria other than rickettsial disease.

The Court: Q. That is generally true, isn't it, that pneumonia germs come in secondarily after the patient is [117] weakened from any number of diseases? A. Exactly, yes.

Mr. Taaffe: Q. By the way, Doctor, am I correct in stating that the infectious tick transmits the rickettsia to the bloodstream of the human being upon which it feeds; is that correct? A. Yes.

Q. And that rickettsia is carried through the bloodstream and lodges someplace in the body; that is correct, isn't it? A. Yes.

(Testimony of Monroe D. Eaton.)

Q. It will usually attack the weakest place; that is correct, isn't it?

A. Well, you are getting into very controversial subjects there on which I would not want to venture an opinion at this time.

Q. As a matter of ordinary common sense to a layman—I am not technical in these matters, as you know—isn't it a fact that a germ will usually attack a weak spot in a human being?

A. Not necessarily.

Mr. Friedman: They have a peculiar affinity for certain parts of the body despite strength or weakness.

Mr. Taaffe: Q. Doesn't the rickettsia have an affinity for the lungs so that in numerous cases where there has been a rickettsial infection pneumonia, either primarily or secondarily, as you say, results? Isn't that true?

Mr. Mackey: He did not say "primarily." I object to that question.

Mr. Taaffe: Let me have the word "primarily" taken out. It secondarily ensues, then?

A. Pneumonia is due to the weakened condition of the patient. I would not say that that is evidence that the rickettsia invades the lungs.

Q. In many of these cases people die of pneumonia, don't they? [118]

A. Quite frequently, yes.

The Court: How do you spell that word "rickettsia"?

(Testimony of Monroe D. Eaton.)

Mr. Taaffe: R-i-c-k-e-t-t-s-i-a. It is named after Dr. Ricketts, who discovered these bodies, if it please your Honor.

The Court: This rickettsia is the description of a body and is the germ of what diseases? Any special diseases?

Mr. Taaffe: Yes, a great many diseases, your Honor.

Mr. Mackey: If the Court please, I think we should have that from a witness rather than counsel. I think it is recognized that there is only one kind.

Mr. Friedman: I think all the Court wants is general information so he will know what is going on.

The Court: Nobody has explained to me what exactly this rickettsia is.

The Witness: It is a class of organisms which causes typhus, various spotted fever that appear all over the world of various types; there is a disease in Australia known as Q fever.

The Court: Q. Do mosquitoes carry some of those?

A. No, they are not carried by mosquitoes. They are usually carried by ticks, lice, fleas.

The Court: That is clear.

Mr. Taaffe: That is all.

The Court: Anything further?

Mr. Mackey: I think he has opened up a new field there on his redirect, and I would like to pursue the matter.

(Testimony of Monroe D. Eaton.)

Recross Examination

Mr. Mackey: Q. Doctor, what is the tissue that rickettsial bodies have a high—I think you fellows call it specificity—for in the human host?

A. Ordinarily it is the vascular endothelium.

[119]

Q. Is that affinity for the blood vessels largely confined to those in the periphery of the body?

A. You mean in the skin?

Q. Well, yes, those, we will say, not the vessels in the skeletal but in the subcutaneous minute blood vessels and arterials.

A. They are usually found in the small blood vessels.

Q. And what do those rickettsial bodies, after they go into that endothelium and smooth muscle cells of the arterials, what if anything do they do pathologically?

A. Well, they generally cause the death of those cells, sometimes a blocking of the vessel.

Q. Is there a proliferation of those cells?

A. Sometimes, yes.

Q. By plugging of that, do you mean the flow of blood through the blood vessel will be stopped?

A. Exactly.

Q. And that would result, in the later stages at least, in the blood vessel bursting and the blood permeating into the tissues. Now, did you have before you to examine such tissues from Dr. Barr, or at least among the tissues that were furnished you by Dr. Carr?



(Testimony of Monroe D. Eaton.)

A. Yes, we had various tissues.

Q. Among others, the endothelium?

A. Well, we had—of course, all the tissues contain blood vessels—I do not recall examining a section of the skin itself, although I believe there was a bruise on the shoulder which was examined by Dr. Carr.

Q. Isn't it a fact that you found any such lesions as you have described as characteristic of rickettsial diseases wholly absent in the specimens you examined?

A. No, we did not see any evidence of such lesion.

Q. You did not—— [120]

Mr. Taaffe: Just a minute. The witness had not finished.

The Witness: I said we did not see any evidence of such lesion in the small blood vessels.

Mr. Mackey: Q. You examined them microscopically? A. Yes.

Q. And the State has good equipment over there for that purpose? A. Yes.

Q. And these virus—I do not know what the plural of “virus” is—— A. Viruses.

Q. You can't see those, can you?

A. Not ordinarily, no. You can sometimes see the results of their action.

Q. You can see the results of their actions, but there is a dispute in the medicinal pathological world, is there not, as to their nature, some people

(Testimony of Monroe D. Eaton.)

saying they are chemical and others saying they are biological in nature?      A. Yes.

Q. And the lesions that you did see were those that you commonly see in virus pneumonia cases, with which there is no suspicion whatever of rickettsial bodies?

A. Well, yes. Commonly we see that type of lesion, although there is one exception which we have to bring up there, and that is the outbreak at the National Institute of Health in Washington, where the rickettsial Q fever did cause pneumonia of this type.

Q. Has any case ever come to your own observation, or have you ever read of any reported case that occurred under natural conditions, where a pneumonia was directly induced by rickettsial bodies?

A. Not under my own observation, no.

Q. And from your reading of the so-called institutional outbreak in Washington to which you referred, is it definitely regarded in the scientific world that rickettsial bodies were conclusively demonstrated to have been the cause of that [121] outbreak, or is it a matter of conjecture as to what did cause it?

A. Well, they were definitely demonstrated in two or three cases.

Q. In two or three of the fifteen cases?

A. I believe, yes.

Q. And the pathology was that of a virus pneumonia?      A. Yes.

(Testimony of Monroe D. Eaton.)

Q. And they were not demonstrated in the balance of the cases, which would be some thirteen or twelve cases, and it is a matter of conjecture as to whether the causative agent in the fifteen cases was rickettsial or virus of the usual kind encountered in the atypical pneumonia?

A. Yes. That is a matter of controversy, I think.

Q. And no such case, to your knowledge, from your reading or experience, has ever occurred outside of the laboratory conditions? A. No.

Q. Do you know, Doctor, of any case where it is reported that a pneumonia was directly induced by a tick bite? A. No, I do not.

Q. Did the institutional outbreak at Washington purport to involve any tick bite of any kind or character?

A. No, there was no evidence that any of these people had been bitten by anything.

Q. And if rickettsia were to be suspected in that institutional outbreak at Washington, it was pretty clear that the only available means of transmission would have been that of inhalation?

A. It was presumed, I think, that that is what had occurred.

Q. In any event, the possibility of transmission by bites from the vector was entirely eliminated by the persons who wrote the articles on the institutional outbreak, was it not?

A. As I recall, from my reading of that article, that was the [122] case.

Mr. Mackey: Nothing further.

(Testimony of Monroe D. Eaton.)

Further Redirect Examination

Mr. Taaffe: Q. There isn't any doubt, is there, medically, Ooctor, that various ticks, including the *Dermacentor andersoni*, *amblyomma* and *Americanum*, carry rickettsia?

A. They may carry rickettsia, yes. They do not all carry rickettsia.

Q. Not all ticks carry it, but those two species carry it, don't they? A. Yes.

Q. That is, some of them do; of the millions of billions of ticks, many of them carry it, isn't that correct?

A. No, I wouldn't say that many of them carry it. Probably a very small percentage of them carry it.

Q. In certain areas many of them carry it, isn't that true?

A. Well, yes. I think, as I recall, in the areas where spotted fever is endemic—in Montana there is about ten per cent that are infected.

Q. And in parts of Idaho, in the Bitter Root Mountains, spotted fever is endemic because of these ticks; that is correct, isn't it? A. Yes.

Q. And in parts of Northern California you have any cases of it also; that is correct, isn't it?

A. Yes.

Q. And Lassen County, California, is within that area; that is correct, isn't it? A. Yes.

Q. Now, if a tick from Lassen County bit a man and caused his death, you would expect to find

(Testimony of Monroe D. Eaton.)

rickettsial-like bodies in the man upon investigation after death; that is correct, isn't it?

A. You should, yes.

Mr. Taaffe: That is all. [123]

### Recross Examination

Mr. Friedman: Q. Doctor, if he died from anything that could be transmitted by a tick, the mere fact that the man died and was bitten by a tick would not convince you that there would be rickettsia-like bodies anywhere?

A. It would be very probable.

Q. That would depend upon what he died from, wouldn't it?

A. Exactly. I mean, the tick—it is conceivable that ticks might carry something other than rickettsia.

The Court: I think, Mr. Friedman, that you misunderstood what the doctor said. He assumed that the man was bitten by a tick that carried these bacteria.

Q. Isn't that right?

A. If the man were bitten by a tick that carried rickettsia, presumably you would be able to see it.

Mr. Friedman: Of course, I understood the question the other way.

Q. If a man was bitten by a tick from Lassen County and died, those facts standing alone would not cause you to look for rickettsia, because he may have died from something that was not caused by the tick at all?



(Testimony of Monroe D. Eaton.)

A. They would cause me to look for rickettsia, but would not cause me to assume that he had died from a rickettsia disease.

The Court: Q. You would have to make the further assumption that every tick in Lassen County did not have this rickettsia.

A. That is what I said.

Mr. Friedman: Q. Do you know what the percentage is in Lassen County of infected ticks?

A. I do not know.

Q. It is lower than the Bitter Root Mountains?

A. As I said, my impression is it is about ten per cent of ticks infected. [124]

Q. Just one more question I want to ask you. You mentioned the fact that inoculation tests could not be made with specimens of blood that had been embalmed, because the bodies were dead.

A. Exactly.

Q. Those bodies, even though dead, can be seen under a microscope, can't they?

A. Yes, rickettsia could be.

The Court: Is there anything else?

Mr. Mackey: I would like to ask the doctor one more question.

Q. Would you expect to find rickettsial bodies or rickettsia-like bodies, or, to put it this way, Doctor, one who was trained in the recognition of rickettsia would have no great difficulty in demonstrating them if they were present; is that not correct?

A. No, they should be able to.

(Testimony of Monroe D. Eaton.)

Q. And if he had a proper specimen and were trained in staining and fixing and in recognition, he would say they were rickettsia or they were not rickettsia?

A. A person well experienced in the recognition of rickettsia should be able to positively identify what he saw as rickettsia.

Q. Did you see any bodies that were rickettsia in the specimens that you examined?

The Court: He has already answered that several times, hasn't he?

The Witness: No, no.

Mr. Mackey: Q. And did you see any bodies that were at all rickettsia-like in those specimens?

A. No, I didn't see anything that would suggest rickettsia to me.

Mr. Mackey: That is all. [125]

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KARL F. MEYER

called for the plaintiff; sworn.

The Clerk: Please state your full name to the Court.

A. Karl F. Meyer.

Direct Examination

Mr. Taaffe: Q. What is your occupation?

A. I am Director of the Hooper Foundation of Medical Research of the University of California. I am Professor of Bacteriology.

(Testimony of Karl F. Meyer.)

Q. You are Professor of Bacteriology?

A. At the University of California.

Q. When you say you are the director, you are the head of the Hooper Foundation, is that correct?

A. Correct.

Q. Will you state briefly what the Hooper Foundation is for the purpose of the record?

A. The Hooper Foundation is primarily a research institute entrusted with investigations into the causes of disease and prevention of disease.

Q. Doctor, did you receive from Drs. Rusk and

A. M. Moody specimens or sections of the lung tissue of Dr. Arthur Barr in June 1942?

A. I saw the sections with them together.

Q. With them together? A. Right.

Q. Did you make an examination of those sections for the purpose of making certain determinations?

A. I was consulted by Dr. Rusk with regard to the interpretation of certain findings in the lung.

Q. And with those doctors, Rusk and Moody, you made the examination, is that correct?

A. I made the examination.

Q. Will you tell us what you did, Doctor, with those specimens and what you found?

A. Well, the specimens were sections prepared by Dr. Rusk. They were stained by means of the hematoxylin-eosin method. The microscopic preparations were [126] mounted on slides and they were put under a biangular microscope and examined and low and high power. I recognized in cer-

(Testimony of Karl F. Meyer.)

tain patches of the lung sacs peculiar bodies which I could not identify with the eosin-hematoxylin stain. Therefore, I requested Dr. Rusk to stain some new sections, which he did. They were stained by means of the Gram stain and by means of the methylene blue and eosin stain.

Mr. Mackey: May I ask the doctor a question?

Q. Doctor, were you present when he stained these tissues?

A. I was not present. The sections were prepared in the laboratory of Dr. Rusk.

Mr. Taaffe: Q. And then brought to you again?

A. And then brought to me again. There were, as I said, in the Gram stains clusters of Gram positive cocci. There were some cells that looked like desquamated epithelial cells, which had peculiar bodies inside of the cytoplasm of these cells, and I said they looked suspiciously like elementary bodies. She insisted upon never using that designation "rickettsial bodies." I said "elementary bodies." I said, "We cannot make any further staining reactions with regard to these bodies," for the simple reason that this was material which had not been fixed in bichloride or in bichromate mixtures. Thus you can't use certain staining procedures. Therefore, the opinion was rendered the findings on the lung were indefinite. There are, however, definite clusters of cocci which any experienced bacteriologist would say they may have been streptococci or they may have been staphylococci, and that is the opinion which I rendered.

(Testimony of Karl F. Meyer.)

Q. A virus cannot be seen under a microscope ordinarily, is that correct?

A. Again from the standpoint of an expert [127] you have got to qualify that.

Q. Go ahead, Doctor, and qualify it.

A. Certain viruses very definitely are corpuscular—I think that is in the definition—they are corpuscular. Consequently, with the proper magnification you certainly can see them, and you can use new methods. You can use fluorescein bicustape by treating it with certain fluorescein dyes, and using some ultra violet lights you can demonstrate it.

Q. These elementary bodies of which you spoke, which you found in the lungs, in those sections or specimens, were bodies other than virus, isn't that correct?

A. You couldn't say that. An elementary body—the term is used to express a corpuscular element which is within the cytoplasm nucleus of a cell. Now, whether that is produced by a virus or is a virus itself, that is naturally a matter which cannot be decided without experimental tests. The microscope in this respect is merely a tool to lead you to certain directions as to what you should do.

Q. Now, what would you expect to find, Doctor, if there were rickettsia present in those specimens?

A. Well, you might find clusters of coccoid, broad-shaped elements, which I want to put in the record are very difficult to stain.

Q. Very difficult to determine?



(Testimony of Karl F. Meyer.)

A. Very difficult to stain and to determine, and you have to use special staining methods to do that. In fact, to be perfectly frank, some people have had extreme difficulties in demonstrating rickettsial bodies in sections—in sections. I insist upon “sections.”

Q. What is the significance of that “in sections,” Doctor?

A. Well, because there are layers upon layers of cells. In other words, instead of having one thin film of cells, you have two or three layers of cells on top of it, because you can only [128] cut two or three.

Q. These elementary bodies that you saw, you say, were in clusters?

A. I said there were elementary bodies in the cytoplasm. I haven't said “clusters.” Some of them, naturally, were in small aggregates.

Q. Aggregates?

A. That would be the term to be used.

Q. If you found rickettsia, you would expect to see them in aggregates, is that correct?

A. Correct, yes.

Q. Were these bodies suspicious—let me withdraw that. Were they rickettsia-like bodies, Doctor, as distinguished from rickettsia?

A. Well, an elementary body in many cases could be said it was rickettsia-like.

Q. Rickettsia-like?

A. Sure, but that is naturally a question of terminology.

(Testimony of Karl F. Meyer.)

Q. In this case, of course, you know the body had been embalmed, don't you? A. Correct.

Q. That added an obstacle to your eventual determinations, isn't that correct? A. Correct.

Q. Could you say in this case, Doctor, considering this tissue had come from a body which had been embalmed, that those bodies which you saw could have been rickettsia, in your opinion?

Mr. Mackey: If the Court please, I object to that question for this reason: The answer calls for mere conjecture. Proof that a certain bacterium might have been present, and which due to inability of methods for recognition cannot be said——

The Court: I do not see how that would aid me in determining the matter.

Q. Could it, Doctor? It could not help the Court in determining this matter for you to tell me if you had used some other method or there had been some other condition it might have been [129] present?

A. If it had been definitely fixed, certainly it could have given a different result. I think embalming was indeed a great disadvantage.

Mr. Taaffe: May I say this for the record: In the literature of experts and people who have had vast experience in this subject, very often reference is made to these bodies as rickettsia-like bodies. Very often, as Dr. Meyer says, it is very difficult to determine, even when you have a perfectly conducive specimen.

The Court: You have established that. The witness has testified to that.

(Testimony of Karl F. Meyer.)

Mr. Taaffe: I simply want to, because of the general aggregate that the doctor speaks of that he has observed, I want to ask the question—which I have a perfect right to do, because we are only dealing with probabilities here—if these could have been rickettsia, these bodies he saw. The law on this subject, if the Court please, we do not have to demonstrate——

The Court: I will allow the question. Can you answer that question, Doctor?

The Witness: I wouldn't commit myself on that, whether they are rickettsia or elementary bodies. You could not commit yourself on a microscopic examination of sections on embalmed material.

Mr. Taaffe: That is exactly the answer I wanted.

Q. In other words, Doctor, they could be rickettsia or they could be other bodies; is that right?

A. You can choose from the two. From the scientific point of view I could not commit myself.

Q. I am not asking you to say they were rickettsia. They could [130] have been one or the other?

A. From the law of probability, yes.

Q. Doctor, did you receive from Dr. Moody a tick?  
A. Yes.

Q. In June of 1942?                      A. Correct.

Q. Somewhere along about June 8 or 9 or thereabouts?

A. June 8, if I remember correctly.

Q. And what did you do with that tick?

A. The tick was examined by myself, and I sent it over then to Professor Herman in the depart-

(Testimony of Karl F. Meyer.)

ment of entomology of the University of California for final identification. He reported back——

Mr. Mackey: Just a minute. I move to strike the last part of the answer as not responsive. The question is, What did he do with the tick?

The Court: Q. Did you make any examination yourself?

A. I just looked at the tick and saw that it was dead.

The Court: All right; was have got that.

Q. Someone else made an examination at your request? A. At my request.

Mr. Taaffe: Q. You sent the tick to whom?

A. Herman.

Q. Professor William Herman of the University of California? A. Yes.

Q. Did you get a letter back from Dr. Herman?

A. Right.

Q. Have you that letter or a copy of it?

A. I have merely a copy of the note which I sent to Dr. Moody.

Q. May I see that?

In the interest of saving time, have you any objection to introducing that?

Mr. Mackey: Yes, I think the person to identify this tick is Dr. Herman.

The Court: Are you going to have him as a witness? [131]

Mr. Taaffe: I have him under subpoena, yes.

The Court: Do we need to go into that any further?

(Testimony of Karl F. Meyer.)

Mr. Taaffe: Yes, I think this matter of the letter will be cleared up when Dr. Herman is called.

Mr. Mackey: We object to any testimony from the witness to the effect that Professor Herman——

Mr. Taaffe: There is no question pending.

The Court: I do not know what counsel is going to ask.

Mr. Taaffe: I think that is all, Doctor.

The Court: Any questions?

### Cross Examination

Mr. Mackey: Q. As I understand your conclusion, Doctor, it is that you cannot say that the elementary bodies which you saw were rickettsia?

A. That is correct.

Q. And you cannot say what else they might have been? A. That is correct.

Q. It is a fact that they might have been any one of numerous or perhaps we might say innumerable other things? A. That is correct.

Q. And they might have been any of a number of things which we see in the usual case of virus pneumonia where there is no suspicion or where there is no history of a tick bite?

A. That is correct.

Mr. Mackey: That is all. Thank you.

Mr. Taaffe: That is all.

The Court: I think I will take an adjournment at this time until tomorrow morning at ten o'clock, gentlemen.

(Whereupon an adjournment was taken until Wednesday, November 3, 1943, at 10:00 a.m.)



Wednesday, November 3, 1943

10:00 A.M.

The Clerk: Barr v. Travelers Insurance Company; Barr v. Equitable Insurance Company.

Mr. Taaffe: I desire to put a very short witness on at this time, if your Honor please.

KEITH R. FERGUSON

called for the plaintiff; sworn.

The Clerk: Please state your full name to the Court.

A. Keith R. Ferguson.

Direct Examination

Mr. Taaffe: Q. Your name is Keith R. Ferguson, is that correct?

A. That is correct.

Q. And you are at the present time and for some period of time you have been a lieutenant commander in the United States Navy; is that correct?

A. That is correct.

Q. Prior to your enlistment in the United States Navy you were a practicing attorney in the City and County of San Francisco, State of California; is that correct?

A. That is correct.

Q. Entitled, of course, to practice your profession in all the courts of this State; is that right?

A. That is correct.

Q. And so entitled for many years last past, is that true?

A. That is correct.

Q. Commander Ferguson, you were related to the deceased, Arthur Barr, were you not?

A. I was his brother-in-law.

(Testimony of Keith R. Ferguson.)

Q. Mrs. Ferguson was a sister of Arthur Barr; is that right? A. That is correct.

Q. You are one of the attorneys of record herein, is that true? A. That is correct. [133]

Q. Do you recall the day of the autopsy or the fact that an autopsy was performed in the Keaton Funeral Parlors on the remains of Arthur Barr?

A. It was in September of—no, not September—

Q. On or about June 9, 1942?

A. June 9, that is correct, 1942.

Q. Were you present at the autopsy?

A. I was there in the building. I was not present when the body was—

Q. On that day did you receive any object from Mrs. Zeila Barr, the widow of Arthur Barr?

A. I did.

Q. What was that object?

A. It was a tick.

Q. You are familiar with what ticks are, I take it?

A. Well, I have seen quite a few while I was hunting.

Q. What did you do with that tick?

A. I delivered it to Dr. Moody.

Q. Dr. A. M. Moody?

A. That is correct.

Q. The gentleman who sits directly behind me at the counsel table; is that so?

A. That is correct.

Mr. Taaffe: I take it it won't be necessary to ask any questions of Mr. Ferguson concerning the

(Testimony of Keith R. Ferguson.)

insurance policies, the delivery of the Equitable policies delivered by Mr. Ferguson.

Mr. Mackey: We so stipulated; it was in force and in effect.

Mr. Taaffe: And similarly, I take it, Mr. Friedman, the presentation of claims by Mr. Ferguson and the like of that will be stipulated?

Mr. Friedman: We have made the same stipulation.

Mr. Taaffe: That is all.

Mr. Mackey: No questions, your Honor. [134]

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ADELBERT M. MOODY

called for the plaintiff; sworn.

The Clerk: Please state your full name to the Court.

A. My name is Moody, and the initials are A. M.—Adelbert M.

Direct Examination

Mr. Taaffe: Q. What is your profession, Doctor?

A. I am a physician and specialize in pathology.

Q. You are a graduate of what college?

A. Rush Medical College.

Q. Located where? A. In Chicago.

Q. In what year did you graduate?

A. 1910.

Q. Will you speak up, Doctor, sufficiently loud so that counsel at the other table can hear you?

(Testimony of Adelbert M. Moody.)

A. 1910.

Q. How long have you been specializing in pathology, Doctor?

A. Well, since I finished my internship in April 1912.

Q. Has your entire professional life been devoted to the specialty of pathology?

A. Well, with a few exceptions, yes.

Q. Of course, you are entitled to practice your profession in the State of California and are licensed so to do; is that correct? A. Yes.

Q. In your profession as a pathologist or specialty as a pathologist have you held any official positions?

A. In the Government, the City and County. I was pathologist of the City and County of San Francisco at one time.

Q. For how many years?

A. Four and a half years.

Q. Attached to the Coroner's office, is that correct? A. Yes, sir.

Q. In your capacity as such pathologist for the Coroner or for the City and County of San Francisco, were you called upon [135] on many occasions to make pathological determinations?

A. I was.

Q. Many thousands of times?

A. Well, I wouldn't go so far as to say many thousands.

Q. A few thousand times, to put it that way?

A. Yes.

(Testimony of Adelbert M. Moody.)

Q. Have you been connected with any hospitals in San Francisco, say, in your capacity as pathologist?

A. Yes, I was pathologist at the St. Francis Hospital.

Q. For how long?

A. Well, for a little better than fifteen years.

Q. Are you now the pathologist at any hospital in San Francisco?

A. Yes, at St. Mary's Hospital and for the Southern Pacific.

Q. Doctor, in your capacity as pathologist were you present at an autopsy performed upon the body of Dr. Arthur Barr at Keaton's Mortuary in San Rafael on June 9, I believe the date to have been, 1942?

A. I was.

Q. What other persons were present at that time?

A. Well, Dr. Berger performed the autopsy, and Dr. Rusk and Dr. Carr and myself were there as pathologists also.

Q. The Dr. Berger whom you mentioned is Dr. A. A. Berger, is that correct?

A. That is correct.

Q. Dr. A. A. Berger is now commander in the United States Navy stationed overseas, is that correct?

A. Well, he is in the service. I do not know just what his station is or where he is.

Mr. Taaffe: Will you stipulate he is overseas? I have inquired and I can tell you the exact place.



(Testimony of Adelbert M. Moody.)

Mr. Friedman: He is not available, anyway. I don't know where he is.

Mr. Taaffe: I can describe it generally as being Oceania. [136]

The Court: Counsel has stipulated he is not available. He is in the service.

Mr. Taaffe: Q. Doctor, you were present representing the plaintiffs in these actions; that is correct, is it not? A. That is correct.

Q. Representing the widow and the minor children; that is true, isn't it?

A. Well, I was really indirectly representing them, but I was asked by Dr. Berger to come and handle certain portions of the examination for him.

Q. That autopsy was performed by Dr. Berger in the presence of those other medical men we have mentioned, is that correct?

A. That is correct. The attending physician was there also.

Q. Dr. Homer Marston, is that correct?

A. Yes, that is correct.

Q. You observed the autopsy, is that true?

A. That is correct.

Q. Upon its completion, or in the course of the autopsy you took certain specimens, sections, and the like; is that correct? A. That is correct.

Q. Did you observe the condition of the lungs visually at the time of the autopsy?

A. Well, yes, to some extent.

Q. Would you describe your visual observations at that time?

(Testimony of Adelbert M. Moody.)

A. Well, I made no special note of the gross appearance of the lungs. I do remember that they were quite edematous and irregularly hemorrhagic, and there was some consolidation in both bases, as I remember it.

Q. What is a consolidation, Doctor?

A. Well, it means an inflammatory reaction which increases the resistance of the particular part where it is inflamed.

Q. At the time that the autopsy was performed was it evident that the body had been previously embalmed?

A. Yes, the [137] body had been embalmed very definitely.

Q. Will you state what sections, specimens, you availed yourself of for the purpose of further determinations?

A. Well, I had a large portion of the brain and I had a piece of skin; I had sections of lungs, heart, lymph glands, liver, spleen, kidneys, adrenals, seminal vesicles, testes, blood vessels—I think that I had portions of all the tissues. They were divided equally between the three of us. At least, Dr. Berger, who did the autopsy, would distribute a sample of each specimen to each of the three of us, Dr. Rusk, Dr. Carr and myself.

Q. Did you pursue your investigation of those specimens at a later time, Doctor? A. I did.

Q. In your own laboratories, is that correct?

A. That is correct.

(Testimony of Adelbert M. Moody.)

Q. Did you make your further investigations for the purpose of discovering the presence of any significant bodies?

A. Well, yes. I made an attempt to find them.

Q. An attempt to?           A. Yes.

Q. Does the fact that an autopsy, or, rather, that an embalming had occurred previously place an obstacle in the way of those determinations?

A. Well, I think so, yes.

Q. In other words, do you feel or is it your opinion that had the autopsy been performed and the sections or specimens taken prior to embalming that more conclusive determinations might have been made?           A. That is correct.

Q. Did you make an investigation, Doctor, of the specimens or sections mentioned with a view to ascertaining the presence of rickettsia?

A. I did.

Q. Did you find any bodies which might have been rickettsia? [138]

Mr. Mackey: I object to that, your Honor, as improper, irrelevant and immaterial.

Mr. Friedman: I will further object on the ground it calls for the opinion and conclusion of the witness, a mere matter of conjecture. He can tell what he found.

Mr. Taaffe: And he can name what he found. He is an expert witness, if it please your Honor. He has a right to say whether bodies were——

The Court: Well, I think you would have to lay

(Testimony of Adelbert M. Moody.)

the foundation. He would have to testify what he found, first.

Mr. Taaffe: Q. Did you find certain bodies, Doctor, of significance?

A. Well, I do not know whether they are of any significance or not. I found what I thought was one mass of annucleation bodies in the section of the lungs, but that is the only place.

Q. In the sections of lungs? A. Yes.

Q. What was the appearance of those bodies? Were they in clusters or aggregates?

A. Yes, they were included in a fairly large cell with Gimsa stain. They stain green. There was a whole group of very fine bodies that I was unable to identify. I made a search to see if I could find any others resembling them, but I could not.

Q. Might those bodies which you have described and which you found in clusters or aggregates been rickettsia?

Mr. Mackey: Your Honor, I object to that as entirely speculative, probative in no respect whatsoever.

Mr. Friedman: He has already stated he could not identify them.

Mr. Taaffe: For that very reason I have asked the witness whether they might have been one type of body or another type; [139] in other words, if they might have been that type of body. it is possible they come within that classification. Once more counsel are confused with the rule that is

(Testimony of Adelbert M. Moody.)

applicable in these cases, if it please your Honor. We are not required to prove anything conclusively or to the point that it is incontestible. All we are concerned with—and that is the purport of the decisions, and they so state in so many words—we must prove the probabilities. That is the burden that rests upon us. The Circuit Court of this very circuit has said that is the rule in cases of this kind, if it please your Honor—I do not mean in tick cases, but I mean in medical cases of this kind.

The Court: Is it your contention that it is competent to prove probabilities and then doesn't the question arise, having done that, is that competent evidence? Does it prove anything after you have done it?

Mr. Taaffe: Yes.

(Discussion between Court and counsel on the objection.)

The Court: Let the witness answer the question. I will overrule the objection. So the record may be clear on it, the record may show at this point I do not believe any weight attaches to an answer based upon probability of that kind. Counsel may have his point in the record.

Mr. Friedman: May the record show the Travelers Insurance Company has made the same objection?

The Court: Yes.

Mr. Mackey: May I make a brief observation? It must be obvious to your Honor that the two cases cited by counsel refute his position here.



(Testimony of Adelbert M. Moody.)

The Court: I am inclined to think so, but we have had this discussion, and so that counsel for the plaintiff may have [140] his matter in the record, I will overrule the objection subject to the comment the Court has made, and it will be very evident in the record as to the basis of the ruling.

Q. Now, after all this, do you still have the question in mind?

A. If I may answer it in my own way.

Mr. Taaffe: May we have the question read?

The Witness: I think I understand the question.

The Court: Do you wish to reframe the question, Mr. Taaffe, or let the reporter read it?

Mr. Taaffe: I will reframe the question.

Q. Could those bodies which you have described—and it is my recollection that those were the bodies in clusters that stained green under the Gimsa stain—have been rickettsial bodies?

A. I really do not know whether they could or not, but it was my impression that what rickettsial bodies should look like were not like the bodies I saw.

Q. By the way, Doctor, in all your experience in the Coroner's office in San Francisco with some few thousand cases, in all your experience in St. Mary's Hospital as pathologist there, in all your experience in the St. Francis Hospital as the pathologist there, have you ever come in contact with a case involving death due to rickettsial bodies?

Mr. Friedman: May I ask whether counsel is

(Testimony of Adelbert M. Moody.)

now going to impeach this witness because he did not like the answer?

Mr. Taaffe: No, that is not the purpose. I will state what the purpose is. I want to show it is a disease that is rare in this locality. Doctors are unfamiliar and unacquainted with it generally. I want to show that it is a disease that is localized to the areas where the tick exists of that kind, and it is brought into other communities, and so on. [141]

The Court: That may be so. I think the objection is good. I will sustain it.

Mr. Taaffe: For the purpose of the record, I offer to show by this doctor that this is a rare disease, except in localities where ticks which are contaminated with various types of disease are inhabitants of that region.

The Court: I think counsel will probably all agree with you on that statement.

Mr. Friedman: I do not think there is any question that not the disease of which Mr. Barr died but the disease produced by an infected tick, of course, is more prevalent in counties that have ticks than it is in metropolitan area where we have no ticks.

The Court: I think that would be a reasonable assumption.

Mr. Taaffe: I want to show not only it is more prevalent—that is a matter of comparison and degree—I want to show it is practically non-existent; that a case never existed hardly in San Francisco. I will go further and include a question of this type which I had not contemplated, and ask him if he

(Testimony of Adelbert M. Moody.)

ever heard of a case in San Francisco or in this region before this time.

The Court: I rather think what you are doing is not so good for your own case.

Mr. Taaffe: I want to show that if doctors are uncertain—when a doctor like Dr. Eaton says a thing might have been something or it might not have been something—the rarity of the disease has an influence, and I think the Court would be interested in knowing if it is a common disease that could be easily recognized, the Court might conclude the mere fact that there is uncertainty—— [142]

The Court: You have asked this witness what his opinion was as to whether this could have been this type of body, and he gave a certain answer to that that would indicate he did not think they were. Now you want to cross-examine him to show that the thing was there and he did not have any experience along that line?

Mr. Taaffe: It isn't on account of that question. Suppose I put this latter question before the other; wouldn't it have been perfectly proper? Suppose before I asked him if they were rickettsia-like bodies I asked him, "Are rickettsial disease rare in this locality?" Would there have been any objection that I was cross-examining my own witness? The mere fact that it follows after the last answer does not have any bearing, I submit, if it please your Honor.

The Court: I think the objection is good. I will

(Testimony of Adelbert M. Moody.)

sustain it. You have made your offer of proof, so the record is clear on that.

I think perhaps it might be advisable after all this discussion to take a brief recess at this time.

(Recess.)

Mr. Taaffe: Q. Doctor, did you make an examination of the brain? A. I did.

Q. Will you state what your examination of the brain revealed?

A. Well, I found some active inflammation of the coverings of the brain which would be termed leptomeningitis, and that was associated with some edema, that is, free fluid in the coverings of the brain, and also some rather chronic thickening of the leptomeninges, especially in the region of the Sylvian fissure on the left side of the brain, which I had for examination. I found no changes of any note elsewhere in the [143] brain except in the third ventricle, where there was a cyst which was apparently of a congenital nature and incidental, I thought, to the present illness.

Q. Did it have any relationship to the present illness? A. I thought not.

Q.. This last condition that you mentioned?

A. Yes.

Q. Were there any other significant matters that you saw in the connection with the brain conditions?

A. No.

Q. Are any of those conditions which you found in the brain, Doctor, associated with Rocky Mountain spotted fever cases?

(Testimony of Adelbert M. Moody.)

A. Well, it is my understanding that a certain percentage of Rocky Mountain spotted fever cases do have leptomeningitis and also some changes within the brain itself, particularly the brain stem and the cerebellum, which were not present in this case.

Q. The leptomeningitis was present?

A. That is right.

Q. And that is associated, then, with Rocky Mountain spotted fever cases, is that true?

A. According to reports I have read, yes.

Q. Did you make an examination of the spleen, Doctor?      A. I did.

Q. Will you state what the conditions were that you found?

A. That the blood sinuses of the spleen were greatly engorged with blood, and there was a relatively small amount of lymphoid tissue present, probably as a result of the increased amount of blood in the spleen, and there were some evidences of inflammation there, but I found no destruction of blood vessels nor areas of necrosis in the spleen, that is, death of splenic pulp tissue.

Q. And is the engorgement of the spleen of which you speak also [144] associated with Rocky Mountain spotted fever cases?

A. Well, you are very apt to have an engorgement of a spleen as a result of an internal vascular collapse.

Q. In Rocky Mountain spotted fever?

A. In Rocky Mountain spotted fever as well as other things.



(Testimony of Adelbert M. Moody.)

Q. Did you find a condition of the lungs which might be characterized as bronchial pneumonia?

A. Well, I would call it an atypical type of pneumonia.

Q. What is "atypical" as distinguished from "typical"?

A. This particular case had purulent bronchitis, that is, there was pus present in the bronchi and in the bronchials, associated with some areas of both of the mucosa of the bronchi and wall with regional involvement of the lung, irregular, patchy consolidation where the alveoli contained leucocytes of various types of small numbers, and in other areas the alveoli filled with fluid as well, and some of them contained evidence of hemorrhage both within the air sacs and also within the walls of the air sacs.

Q. Is bronchial pneumonia, Doctor, associated with Rocky Mountain spotted fever?

A. It has been reported, yes.

Q. Upon the autopsy did you notice any petechial spots on the body of Dr. Barr?

A. I made a notation of five small spots in the upper part of the left arm, I believe it was, adjacent to the—well, in about this region (indicating) in line with the anterior fold of the axillary. I suppose, that is, this space here—I should say it was about in this region.

Q. That is, in the forward part of the arm just below the shoulder joint, is that correct?

A. That is right.

(Testimony of Adelbert M. Moody.)

Q. Were those spots what might be characterized medically as petechial spots?

A. Well, that is what I judge, but in the [145] sections which I had I did not see any blood in the section of the portion of skin that I had.

Q. But you did notice those on the arm of the deceased at the time of the autopsy?

A. That is right.

Q. Now, are petechial spots common to Rocky Mountain spotted fever?

A. Yes, it is my understanding that they are.

Q. What was the heart condition, as you observed it, Doctor?

A. Well, I found an occasional small scar in the portion of the heart that I examined and some edema, that is fluid between the muscle bundles separating them a little bit. But, as I recall, there was nothing else of any particular interest in there. I think the blood vessels were normal.

Q. Doctor, in your examination of the lungs did you find some small necrosing lesions?

A. Oh, yes.

Q. Are such lesions associated with Rocky Mountain spotted fever, necrosing lesions?

A. Well, yes, necrosing lesions are, but they usually involve the blood vessels—that is my understanding—and then secondarily there are degenerations in the tissue supplied by those blood vessels.

Q. Did you make an examination of the liver, Doctor?      A. I did.

(Testimony of Adelbert M. Moody.)

Q. Will you state what conditions you found in the liver.

A. Well, I found acute fatty changes in the liver cells, which are toxic in type, plus a small amount of fatty infiltration in the liver. There was a low-grade, slight parenchymatous hepatitis as evidenced by a slight round cell infiltration to the vessels in the perialveolar region; and there was also a considerable amount of post mortem change in this liver as well.

Q. Changes that occurred after death?

A. I judge so, [146] because I found a large part of Gram positive bacteria, which are ordinarily associated as a secondary invader following death, present in these areas.

Q. Were any of these conditions, except, of course, the post mortem conditions, which you found in the liver associated with Rocky Mountain spotted fever?

A. Well, there is reported some changes in the liver, in certain cases, similar to but ordinarily more extensive than I found in this case.

Q. Doctor, where a man contracts Rocky Mountain spotted fever, and where the onset is rather sudden and he dies within two or three days after the onset, is it not a fact that sometimes in cases of such swift development you do not find many of the signs that you otherwise would ordinarily?

A. That is true, I think.

Q. As a matter of fact, Doctor, in many cases of Rocky Mountain spotted fever where the onset

(Testimony of Adelbert M. Moody.)

is sudden and death is swift and ensuing within two or three days, you very often do not find even extensive macular rash, is that correct?

A. You understand, I have never seen a case of Rocky Mountain spotted fever, that is, to recognize it as such, and so I do not believe I am competent to answer that particular phase of the question, although I do know from what I have read that there is a variation in the type of spots that one finds, depending upon the length of time of the illness and the severity of the illness. But it is my impression that in very acutely ill and fulminating cases one might expect to find large hemorrhagic spots rather than small petechiae or macular eruptions.

Q. What do those large spots look like, Doctor, according to the literature?

A. They would look like bruises. [147]

Q. Are they sometimes described as of the appearance of measles?

A. Well, yes, spots have been described as having the appearance of measles, but I thought you were mentioning the large hemorrhagic spots. That would not look like measles.

Q. That would not; that would look like a bruise. I am speaking now of some of these macular spots or rashes.

A. Oh, yes.

Q. They look, in Rocky Mountain spotted fever, do they, or are they reported to look in medical science like measles very often?

A. Yes, I understand so.

(Testimony of Adelbert M. Moody.)

Q. Did you examine the adrenal glands, Doctor?

A. I did.

A. As I recall, there were small areas of round cell infiltration in the capsule of the adrenal, and that the cortical substance, cortical cells, rather, contained a relatively small amount of lipoid, not the normal amount.

Q. What is lipoid, Doctor?

A. It is a fatty substance.

Q. Is there anything in those glands which is associated with Rocky Mountain spotted fever?

A. Well, not that I could say and be sure about, no.

Q. Did you examine the kidneys?

A. I did.

Q. What did you find there?

A. Well, I found a moderate increase in the amount of blood in the kidney. The kidney cells were slightly swollen and cloudy, and I believe I also found just an occasional fibrous glomerulus, which is not uncommon in a person of this age. The swelling of the kidney could be associated with any acute infection as a result of the toxic effect of the infection regardless of its cause.

Q. Its origin?           A. Yes.

Q. Whether it was Rocky Mountain spotted fever or some other [148] type of case, is that it?

A. That is right.

Q. Doctor, did you receive at the time of the autopsy on June 9, 1942 from Lieutenant Comman-



(Testimony of Adelbert M. Moody.)

der, I think, Ferguson, who preceded you on the witness stand in this case, a tick?

A. I did.

Q. What did you do with that tick?

A. I acted as a messenger with it and took it to Dr. Karl Meyer of the University of California.

Mr. Taaffe: I think that is all.

### Cross Examination

Mr. Mackey: Q. Did you in your gross examination notice the size of the spleen?

A. Well, I did not make any record of the size of the spleen at all. As a matter of fact, I made very few records of gross material, because Dr. Berger was looking out for that part.

Q. You have no recollection of noting any pronounced enlargement of the spleen?

A. No, as I recall it, it was not unduly enlarged; maybe slightly so.

Q. Isn't it a fact, Doctor, that in spotted fever fatal cases, particularly in those of Western origin and those of early fatality, that the disease is accompanied by a very pronounced enlargement of the spleen?

A. Well, it is my understanding that it would be easily palpable by the common method and I do not believe this spleen was large enough to be felt.

Q. You say you diagnosed the cause of death as bronchial pneumonia?

A. Instead of calling it a bronchial pneumonia I called it an atypical pneumonia of a virus type.

(Testimony of Adelbert M. Moody.)

Q. In your practice do you have quite a number of atypical pneumonia cases of various types under observation?

A. Not a great many. I have seen some, however. [149]

Q. Have you seen quite a few of those cases during the past few years?

A. Yes, I have.

Q. Have any of those cases been fatal cases?

A. Oh, yes.

Q. And have any of those fatal cases been swift, fulminating and of short duration?

A. Oh, yes, they may die very quickly.

Q. As quickly as three days from onset?

A. Oh, yes.

Q. And even more quickly than that, Doctor?

A. Yes.

Q. And within the realm of your own experience, in San Francisco, may death occur within forty-eight hours, even, of onset?

A. Well, yes, it may. As a matter of fact, I have seen death of that type that occurred—of course, I saw many during the last—the flu epidemic of 1916, 1917 and 1918, and many of those dies in less than twenty-four hours from the recognized onset.

Q. And was Dr. Barr's death, as revealed by your examination, similar to the pathology of these early fatal pneumonia cases to which you have just referred?

A. Yes, I think so.

(Testimony of Adelbert M. Moody.)

Q. Were there any respects, with respect to the microscopic pathology in Dr. Barr's case, that differed from the pathology in the atypical virus pneumonia of which you have spoken?

A. No, I don't think so.

Q. Now, you spoke of a condition which you found in quite a number of organs which, in answer to the somewhat leading questions of counsel, were associated with Rocky Mountain spotted fever. You reviewed, I think, an infiltration into the leptomeninges, and you said it was your understanding that that frequently accompanied a spotted fever case.

A. That is right.

Q. Now, it is equally true that it frequently accompanies most [150] any infection that results in death; is that not so, Doctor? I mean any respiratory infection such as the type that you saw?

A. Not uncommon, particularly the atypical type of pneumonia.

Q. You would not say simply because a man has an infiltration such as you found in Dr. Barr's leptomeninges that that was any indication that he died of spotted fever, is it?

A. Oh, no.

Q. And isn't that same thing true with respect to the various organs in which you found pathological evidence, that the evidence that you found there was what you would find and expect to find in an atypical virus pneumonia?

A. That is right.

Q. You say according to your reading, a pete-

(Testimony of Adelbert M. Moody.)

chial rash frequently is associated with spotted fever cases, did you not?

A. Yes, that is right.

Q. As a matter of fact, Doctor, isn't that a most common clinical sign of the disease that is known as Rocky Mountain spotted fever?

A. It is my understanding that that is the reason it is called spotted fever.

Q. Did you ever read in any text whatever or in the report of any case that was known to have been spotted fever of the appearance of a rash, either petechial or macular or otherwise, at a date earlier than the onset of the fever?

A. Well, yes, I think that—I can't answer that as regards the relationship to the fever, but my impression is that there are frequent cases reported in which the spots are the first things that are noticed.

Q. Even before the patient becomes ill?

A. No, I think that the patient is feeling a little bit below par beforehand and spots may not appear for a couple of days after he is feeling poorly; but I imagine the spots are the things that [151] attracted attention to some extent.

Q. There has been testimony in this case, Doctor, to the effect that a tick was seen in the skin in the region of the decedent's navel while he was alive on the 31st of May at about one or two p.m., and that at about nine o'clock of the same evening the same witness saw a rash which resembled that

(Testimony of Adelbert M. Moody.)

of measles on the wrists and arm of Dr. Barr. I think you may consider that the onset in Dr. Barr's fatal illness was not earlier than the afternoon of June 4. Is that correct, Mr. Taaffe?

Mr. Taaffe: That is right—not the afternoon; it was the morning the doctor was called in.

Mr. Friedman: June 4.

Mr. Taaffe: Not, the onset was——

Mr. Mackey: June 3.

Mr. Taaffe: No, the onset was June 3. He came home about six o'clock at night and did not eat his supper and had a fever.

The Court: That is what I recall. The testimony shows that that evening he went to bed, his face was flushed, and he was ill.

Mr. Mackey: He went to Dr. Briggs on the 2nd, he worked on the 3rd——

Mr. Taaffe: It was the evening of the 4th, about six o'clock.

Mr. Mackey: Then the statement was correct.

Mr. Taaffe: Yes, that is correct.

Mr. Mackey: Q. Under those circumstances would the appearance of a rash some four days before the onset of the fever—would that, from your reading concerning the disease and your pathological studies, indicate to you that that was [152] any indication of a spotted fever infection?

A. From that particular tick?

Q. Well, no, I will say from any tick. In other words——



(Testimony of Adelbert M. Moody.)

Mr. Taaffe: Let the witness answer the question, please.

Mr. Mackey: Let me put it more simply.

Mr. Taaffe: Let him answer the question. It was a question he was in the process of answering.

Mr. Mackey: Not at all, Mr. Taaffe. Proceed, Doctor.

A. As I understand your question, he had this rash the same evening he was bitten by the tick?

The Court: Counsel wants to eliminate that from his question. He apparently wants you to answer it on the basis of the fact that the rash appeared several days before the man felt ill.

Mr. Mackey: At least the first complaints or before the onset.

The Witness: Your idea is you want to know if I think that that was spotted fever at that time?

Mr. Mackey: No, I am not asking you that.

The Court: You had better reframe it.

Mr. Mackey: Q. From your reading concerning the appearance of rashes that are characteristic of spotted fever, are you of the opinion that such rashes appear as early as four days prior to the onset?

A. No.

Q. That is, you never heard of such a rash appearing? A. No.

Q. You are familiar with the pathology of rickettsial diseases generally, are you not, Doctor?

A. Yes, to some extent, yes.

Q. In a pathological examination, where the object in view is to determine whether or not a de-

(Testimony of Adelbert M. Moody.)

cedent died of a rickettsial [153] disease, there are two avenues of microscopic investigation, are there not, consisting, first, we will say, of searching for, finding, and recognizing rickettsial bodies themselves, and, second, in searching for microscopically and recognizing the lesions in the body which rickettsial bodies generally cause; is that correct, Doctor?

A. That is right.

Q. Did you make that dual type of examination in this case?

A. I did.

Q. You have had considerable experience, I assume, in the field of rickettsial diseases generally? You have examined specimens in typhus cases?

A. I have seen rickettsia organisms from typhus cases, and I have been interested particularly in blood vessel changes, the late changes that may occur following typhus.

Q. It is generally the fact that the pathology of rickettsial diseases, whether they be typhus, spotted fever, or that almost unpronounceable tropical disease—perhaps you can help me there——

A. I can't.

Q. The characteristic pathology in all those cases is a condition of the blood vessels?

A. That is right.

Q. And a rickettsial body is a minute bacterium-like organism which lives and multiplies only in living cells?

A. That is right.

Q. And it is not filterable?

A. That is my understanding.

(Testimony of Adelbert M. Moody.)

Q. And it has a very high specificity for certain tissues? A. Yes.

Q. So when we are looking for it we may safely say if it is in the body it is going to be present in certain effective tissues and it is not from the non-infective tissues; is that [154] correct?

A. Yes.

Q. And in the human host the rickettsial body goes into the blood cell of the endothelium—that is true of typhus and Rocky Mountain spotted fever, is it not?

A. It goes into the endothelium cells of the blood vessels.

Q. The endothelium is the innermost lining of the blood vessel? A. That is right.

Q. And while typhus just invades the cytoplasm of the cell, the rickettsia of spotted fever invade the cytoplasm but sparsely and you find them in contact colonies in the nucleus of the cells that you have just mentioned?

A. It is my undersanding that there is a difference between some of the varieties which cause the different forms of Rocky Mountain spotted fever, and in which some of them are found in the cytoplasm alone and some in the cytoplasm and nuclear material.

Q. But in any event, it is in the cells of the endothelium and possibly the cells of the smooth muscles of the arterials that you expect to find rickettsial bodies if they are present?

(Testimony of Adelbert M. Moody.)

A. Yes, they apparently involve the entire wall of the smaller blood vessels.

Q. And are those the blood vessels of any particular portion of the body that are generally involved?

A. No, they may involve blood vessels of any part of the body; that is my understanding.

Q. What do those rickettsia, if pathogenic, do in those blood cells?

A. Apparently they cause a destruction of the cells themselves.

Q. And the first stage of that destruction is a proliferation, is it not, or a multiplication of the cells?

A. That is right. [155]

Q. And while the disease progresses it results in an occlusion of the blood vessel or seepage?

A. Well, because of the destruction of the cells there, the blood will naturally clot in that area and will cause thrombosis.

Q. And, I suppose, when there is a thrombosis, why, then there is a seepage of blood through the tissues or lymph ducts to the surface of the body or through the surface of the skin?

A. I think the hemorrhage comes from the surrounding vessels, or there may be an increased permeability in all the vessels allowing red blood cells to escape.

Q. Would that be the explanation—the thrombosis and the subsequent escape of the blood—of the petechial rashes?

(Testimony of Adelbert M. Moody.)

A. Partly so, but you may get petechial rashes without actual destruction of the lining of the capillaries.

Q. That is, without the increases?

A. That is right, without any visible increases demonstrable.

Q. It is usual to find that blood vessel condition, which I assume is an acute specific condition—that is correct, is it not, Doctor?

A. No, there are other things besides typhus that may produce that destruction of blood vessels.

Q. But it is common to find that blood vessel condition in the peripheral blood vessels?

A. Yes.

Q. Now, do I understand correctly that you made an examination microscopically for the presence of any of those lesions in the blood vessels of Dr. Barr?      A. I did.

Q. And what was the result of your finding in that respect?

A. Well, on the whole the blood vessels were negative as regards pathology of that nature. There were some changes in the aorta, but I rather felt that they were associated with an arteriosclerosis rather than to an acute infection. [156]

Q. In other words, your finding was in effect, Doctor, that this man did not have the blood vessel condition that is common to Rocky Mountain spotted fever?      A. That is right.

Q. Now, you have already testified, I believe, on



(Testimony of Adelbert M. Moody.)

direct examination that you also found microscopically—that you did not find or recognize any rickettsial bodies in Dr. Barr's——

A. I saw nothing that looked to me like rickettsial bodies.

Q. Let me ask you this: Isn't it a fact that virus pneumonia of the type that you say Dr. Barr's resembled, that they frequently fail to show any clinical sign until the onset of the fever?

A. Well, no. I am not sure of that point at all.

Q. Do you entertain any opinion on that point?

A. Well, not having seen a case, I really do not know. But if the temperature were taken when the man was feeling a little ill, he might have had an increase, but I do not know whether he did or not.

Q. Perhaps I have not made myself clear, Doctor. The common case of virus pneumonia presents an onset with a picture by X-ray of a lung condition which antedates any of the usual chest or respiratory complaints on the part of the patient?

A. Well, I do not know that that is true, no. I think in the cases I have contacted the patients are much sicker, apparently, than the X-ray would lead one to believe. That is my opinion of the virus pneumonia. And the physical findings on that chest may not reveal anything in the lung at all and yet the patient is extremely ill.

Q. In other words, if a patient had an onset on June 4 and had been, as the testimony in this case shows, examined by a physician on June 2 with a stethoscope examination revealing no rales or other

(Testimony of Adelbert M. Moody.)

sign of a respiratory disorder, that would [157] be wholly consistent with an onset of virus pneumonia some two days later, would it not?

A. Oh, yes.

Q. In other words, the clinical manifestations, or perhaps I might say prodromal manifestations, look behind the chest condition?

A. The actual chest condition?

Q. Yes, the actual chest condition, as, we will say, revealed by an X-ray.

A. Yes, that is correct.

Q. Now, these elementary bodies that you saw were the same bodies that you see in the usual atypical pneumonia of a virus nature, were they not?

A. Well, I really do not know what those bodies were, but they suggested to me to be bodies similar to what I found in former cases of virus pneumonia which I had examined. But for that reason I took the slide over to have Drs. Karl Meyer and Eaton to look at it, and they did not give me any very definite answer either.

Q. We have had the testimony of both of those gentlemen in the record in this case. From the sum and substance of your examination, your pathological examination in this case, Doctor, do you entertain any opinion as to whether or not the history of tick bite has any connection with the virus pneumonia?

A. Well, I thought not.

Mr. Mackey: That is all.

(Testimony of Adelbert M. Moody.)

Mr. Friedman: I have no questions.

Mr. Taaffe: Just a few questions.

Redirect Examination

Mr. Taaffe: Q. Doctor, you were asked a question concerning whether it was your opinion that a person could suffer from Rocky Mountain spotted fever evidencing itself in the form of a rash on the same day when a tick was found on the man's body, and I believe your answer was that you did not think [158] the rash could be attributed to that tick; is that correct? A. That is right.

Q. Would your answer be any different if you did not know the length of time that the tick was on the body? Let me put it this way. I will withdraw the question and make it clear in two or three questions.

A tick does not stay on a man only for a matter of moments or hours, does it?

A. Well, I have had no experience with ticks, to tell you the truth.

Q. Did you ever see a dog infected with ticks—infested with them, I should say?

A. No, I think not. I have not had a dog for a good many years, and I have forgotten.

Q. Have you ever seen sores created by ticks on animals other than dogs? A. Oh, yes.

Mr. Mackey: I object to that question, your Honor, on the ground that there is no showing that the effects of rickettsial diseases on dogs and other animals are the same as those on man.

(Testimony of Adelbert M. Moody.)

The Court: All Mr. Taaffe is trying to bring out——

Mr. Taaffe: The length of time.

The Court: The evidence does not show how long it was on the man's body.

Mr. Mackey: The evidence is on the onset, not the bite.

Mr. Taaffe: Q. In those cases where you have seen tick sores on animals, the thing had been on there for several days, isn't that correct?

The Court: I think you are getting into a field that the doctor is not familiar with.

Mr. Taaffe: He said he saw tick sores on animals.

The Witness: No, I did not say that I had seen tick sores [159] on animals.

Mr. Taaffe: I misunderstood you, Doctor.

The Witness: I have seen sores on animals, but I do not know whether they were due to ticks or not. I have seen scabs.

Mr. Taaffe: Q. You do not know that a tick will not remain on an animal or a human being for a period of days, do you?

A. I do not know anything about the habits of ticks, to tell you the truth.

Q. How soon, Doctor, after a tick bite can Rocky Mountain spotted fever display itself?

A. Well, I understand that the incubation period is anywhere beyond two days, from two days up.

Q. To what limit?

A. Well, to ten or twelve days—two to twelve days, something like that; that is my understanding.

(Testimony of Adelbert M. Moody.)

Q. In Rocky Mountain spotted fever cases how soon does death ensue as a result of infection, as a rule?

A. My understanding is it is a matter of ten or twelve days ordinarily before death ensues or sometimes maybe even a little later than that.

Q. Sometimes it may be from four days on; isn't that the average, around six days instead of twelve?

A. My impression was it was longer than that. As a matter of fact, I tried to find a reference to the exact—the shortest time possible, but that I haven't found.

Q. You could not find that. Doctor, if a tick remained on a person for a few days, two or three days, wouldn't the rash display itself, or couldn't it display itself?

Mr. Mackey: I object to that, your Honor, on the ground that no foundation has been laid for the question.

Mr. Taaffe: We have the right to assume it was on there for a certain length of time. We have the proof that he was [160] hunting for three days in country infested with ticks which carried Rocky Mountain spotted fever, and that on the fourth day, when he was in Reno, he discovered a tick. It could have been on him, at that rate, for four days.

The Court: Of course, there is no testimony as to the habits of a tick. I could draw a little bit on my extrajudicial knowledge. I think if a tick were on a man any length of time, it would bore under the skin.



(Testimony of Adelbert M. Moody.)

Mr. Taffe: I have had millions on me—at least I would say thousands—and I have taken hundreds of thousands off of dogs.

Mr. Mackey: You never had Rocky Mountain spotted fever.

Mr. Taafe: Only the head goes in. A tick has never been known to get all the way under the skin. A chigger will, not a tick. Only the head embeds itself.

Mr. Friedman: Mr. Taafe, isn't your point this: that if the rash is a symptom of Rocky Mountain spotted fever, and if it only appears after a certain length of time, that that appearance must be dependent upon some preceding time when the tick infected the person?

Mr. Taafe: That is it exactly.

Mr. Friedman: What is the use of wasting time?

Mr. Taafe: I do not know that it is conceded—it is so important that counsel for the other company objected to it.

Mr. Friedman: Not at all. Mr. Mackey put his question based upon the testimony of Mr. Nave. Now, as a matter of actual science, there must be an interval of some time between the tick bite and the rash. Just what that is has not been developed.

Mr. Taafe: The objection was there was no foundation laid [161] by showing how long the tick had been on.

The Court: What do you want to show by the doctor?

(Testimony of Adelbert M. Moody.)

Mr. Taaffe: If a tick had bitten Dr. Arthur Barr on the two or three or four days before any rash occurred, and the same tick remained on him, we will say, that a rash could be attributed to the earlier date of the tick bite; isn't that correct?

The Witness: Oh, yes.

Mr. Taaffe: Q. You were assuming, when you were answering the question of Mr. Mackey, that the tick bit the man on the same day that the rash occurred; is that correct? A. Correct.

Mr. Friedman: Of course, you are assuming an infected tick.

Mr. Taaffe: Naturally. You can't get a disease from an uninfected tick.

Q. Doctor, you were asked questions concerning a virus pneumonia related to the influenza virus that killed so many people during the influenza epidemic of 1918 and 1919. You remember those questions, don't you? A. Yes.

Q. The fact is, Doctor, that this was not an influenza virus, isn't that correct?

A. I don't know.

Q. Didn't you in your determinations find it was not, in your opinion, an influenza virus of the type of 1918-1919? A. No, sir.

Q. You did not? A. No, sir.

Q. You could not tell? A. No, sir.

Q. You have testified you cannot identify these bodies that you found in the clusters; is that correct? A. That is correct.

(Testimony of Adelbert M. Moody.)

Q. In what tissues did you find those clustered bodies? A. In the lung only. [162]

Q. Had you ever seen any bodies similar to those before?

A. Yes, I found bodies—well, not identical with, but somewhat similar to, those in another case, in a case of psittacosis that I had examined.

Q. That is so-called parrot fever, is that correct?

A. That is right.

Q. And parrot fever, psittacosis, is also communicated from a tick, isn't it?

A. I thought not.

Q. Isn't it communicable from any parasite that attaches itself to a parrot?

A. I think not, no. It is a respiratory infection. That is my understanding.

Q. By the way, when you were speaking about typhus, the tick is a source of typhus, isn't it?

A. That is correct.

Q. Did this case have any of the elements or appearance of a typhus infection to you, Doctor?

A. I thought not.

Q. One of the reasons that you could not make a determination of these bodies that you saw in clusters as rickettsial bodies was because of the coloring of the stain; that is correct, isn't it?

Mr. Friedman: Just a moment. I am going to object to the form of that question.

The Court: It is leading.

Mr. Friedman: Because it assumes if it was in a different state it would be rickettsial bodies.

(Testimony of Adelbert M. Moody.)

Mr. Taaffe: The question is leading and suggestive. Let me put it this way:

Q. Did the color of the stain of those bodies have anything to do with your determination, Doctor?

A. No, the color did not. It was more the size and shape of them that decided me, because I have been in the habit of making allowances for the [163] method of fixation and the method used in the staining of these. So I realized the color would be definitely off.

Q. You are making allowances for that?

A. Yes.

Q. Am I correct in stating that you testified that the only rickettsial bodies that you have ever seen were those in your typhus studies; is that correct? A. That is correct.

Q. You have never had a typhus case yourself, Doctor?

A. Never. I have had some late cases—I mean a matter of years afterwards—but I have never found rickettsial bodies in those.

Q. And those were typhus cases?

A. Yes, originally.

Q. And you did not find rickettsial bodies in them? A. No, sir.

Q. As a matter of fact, it is the rickettsia which is the infecting agent in typhus cases also; that is correct, isn't it? A. That is correct.

Q. Just the same as it is in Rocky Mountain spotted fever; that is correct, isn't it?

(Testimony of Adelbert M. Moody.)

A. That is correct.

Q. And in those typhus cases you did not find rickettsial bodies?

A. Well, I have examined no acute cases of typhus.

Q. But in those cases of typhus you did examine, you did not find any rickettsial bodies?

Mr. Mackey: Well, did the patients die in the case that you are speaking about?

The Witness: Well, no. I have examined amputated legs and studied the blood vessels of those in the so-called thromboangiitis obliterans, which is supposed to be caused originally by rickettsial organisms, and Rocky Mountain spotted fever does the same thing.

The Court: Q. You mean cases of people who previously had [164] the disease?

A. That is right, some years before.

By Mr. Taaffe:

Q. Have you ever examined an acute case of typhus, Doctor?

A. I never have. I have seen direct smears of typhus organisms.

Q. From those cases of typhus, which were merely a matter of interest and study to you, you formed your ideas concerning rickettsial bodies; is that correct? A. That is correct.

Q. Now, rickettsial bodies are the agents responsible for infection in several different types of diseases besides typhus and Rocky Mountain spotted fever; that is correct, isn't it? A. Yes.



(Testimony of Adelbert M. Moody.)

Q. And rickettsial bodies vary in size and force in various diseases; that is correct, isn't it?

A. That is my understanding.

Q. And you have never to this day had a case of Rocky Mountain spotted fever except the present case, assuming for the purpose of the question only that this is such a case; that is correct, isn't it?

A. That is correct.

Q. You have never before seen what purported to be rickettsia in Rocky Mountain spotted fever cases, did you?      A. No, sir.

Q. When you said that these bodies, which you could not identify, in your opinion were not rickettsial bodies, you were basing that opinion upon your knowledge of rickettsial bodies as they are in the typhus cases; that is correct, isn't it?

Mr. Mackey: If the Court please, I object to that question as impeaching his own witness.

The Court: I will sustain the objection.

Mr. Taaffe: Q. Is your opinion that you have given here that the bodies which you could not identify were not rickettsial bodies based upon your knowledge of rickettsial bodies in typhus cases?

[165]

Mr. Friedman: Same objection.

Mr. Taaffe: This question is not leading.

Mr. Friedman: Well, he is arguing with his own witness.

Mr. Taaffe: If it calls for yes or no, it can't be leading.

Mr. Friedman: He does not claim surprise.

(Testimony of Adelbert M. Moody.)

Mr. Taaffe: I am asking whether his opinion is based upon his experience and knowledge, not for the purpose of impeachment——

The Court: Of course, he has already gone over this ground. The doctor has explained quite fully already the basis of his experience.

Mr. Taaffe: I have not asked him this question. That has not been brought out.

The Court: Are you going to be much longer?

Mr. Taaffe: No, I am not going to be very much longer.

The Court: I suppose you are busy and want to get back. All doctors are. I have run over the adjournment hour now.

Mr. Taaffe: I will be through in two or three minutes at the most.

The Witness: *May* answer would be "Yes" to that question.

Mr. Taaffe: Q. Have you ever before seen what purported to be, in your studies, even rickettsia from Rocky Mountain spotted fever cases?

A. No, I have not.

Q. Doctor, do you know it to be a fact from your reading and studies on the subject that in some cases of Rocky Mountain spotted fever, where the onset is sudden, the course of the disease is short, and death follows——

Mr. Friedman: I object to the question as leading.

The Court: He hadn't finished.

(Testimony of Adelbert M. Moody.)

Mr. Taaffe: It calls for a yes or no answer.

[166]

The Court: The question is not complete.

(Question read.)

Mr. Taaffe: Q. (Continuing) —that no rash of any kind appears? A. I do not.

The Court: I will overrule the objection.

Mr. Taaffe: I think that is all.

Mr. Mackey: I would like to ask one question, because I think counsel has brought in a new matter.

Q. Doctor, did the examination show any of the pathology of typhus fever?

A. Well, it didn't show anything which I considered characteristic of typhus.

Mr. Mackey: Thank you.

Mr. Friedman: Let me ask you one question, if I may:

Q. Doctor, you say you have never actually seen rickettsia produced by Rocky Mountain spotted fever or associated with it in the course of your reading; have you seen reproductions of slides depicting the rickettsia from Rocky Mountain spotted fever? A. Yes, I have.

Mr. Friedman: That is all.

Mr. Taaffe: Q. Pictures of them, you mean, Doctor? A. That is right.

Mr. Taaffe: That is all.

The Court: You may be excused. This case will be continued until two o'clock.

(Thereupon a recess was taken until two p. m. this date.) [167]

Wednesday, November 3, 1943,

2:00 P. M.

WILLIAM B. HERMS

called for the plaintiffs; sworn.

The Clerk: Please state your full name to the Court.

A. William B. Herms.

Direct Examination

Mr. Taaffe: Q. What is your occupation, Professor?

A. I am Professor of Phorology at the University of California.

Q. Did you receive a tick from Dr. Karl Meyer of the Hooper Foundation in June of 1942?

A. It would be very difficult for me to say positively, because I receive specimens from the Hooper Foundation and from the California State Department of Public Health and from many other individuals, and it would be difficult for me to say positively that I received this specimen. I frequently receive specimens from Dr. Meyer.

Q. Do you frequently receive ticks from him?

A. I have received some ticks from him at various times.

Q. When you speak about "positively," do you mean your memory is dim on the subject?

A. It is.

Q. Have you a recollection of having received a tick at or about that time from him?

A. No, I have not.

(Testimony of William B. Herms.)

Q. You do not have a recollection?

A. No, I do not.

Q. Do you keep records of the receipt of specimens?

A. There would be no record kept unless I replied by letter.

Q. Have you searched your files for any letter concerning that?      A. I did yesterday.

Q. Did you find the letter?      A. No, sir.

Q. Would this refresh your recollection that you wrote a letter to Dr. Karl Meyer somewhere within a few days before June 15, [168] 1942 telling him that you identified a tick?

A. I couldn't find any letters in my file.

Mr. Mackey: I object to that, your Honor. There is no foundation for that question.

Mr. Taaffe: In what particular? That objection is not a good objection, your Honor, unless it is specified wherein the foundation is not laid.

The Court: The witness says he does not recall writing any letter and he hasn't any record of any letter.

The Witness: I found nothing in my file, and I searched through my "M" file yesterday.

The Court: What are you trying to get at?

Mr. Taaffe: I want to refresh his recollection.

The Court: On what particular matter? Have you got some letter?

Mr. Taaffe: No I have here a copy of a letter that was sent by Dr. Meyer to Dr. Moody advising him of the contents——



(Testimony of William B. Herms.)

The Court: You want to show that document to this witness and refresh his recollection?

Mr. Taaffe: No; this is not his letter, your Honor. This is Dr. Meyer's letter reporting what was found.

The Court: If it serves to refresh his recollection, I do not see any objection to that.

Mr. Mackey: Might I ask a question in aid of the objection?

The Court: Yes.

Mr. Mackey: Q. Do you recall ever having seen such a letter as counsel has just described, being a letter from Dr. Meyer addressed to Dr. Moody?

A. No, sir.

Mr. Mackey: I object, your Honor. I do not see how it could tend to refresh his recollection.

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The Court: There may be something in the letter that would recall the incident to the witness, and even if it is not his own letter, if it would serve to refresh his recollection it would be proper. I do not see any harm in that.

Mr. Mackey: The letter itself——

The Court: Have you seen the letter?

Mr. Mackey: No, I have not.

The Court: Suppose you show it to Mr. Mackey.

Mr. Mackey: Furthermore, the letter has been in no way authenticated, and while I do not distrust Mr. Taaffe, we have a right to insist on that.

Mr. Taaffe: Dr. Meyer gave me that yesterday.

The Court: I recall Mr. Taaffe asked Dr. Meyer

(Testimony of William B. Herms.)

when he was on the stand whether or not he had written a letter, and the witness produced this.

Mr. Taaffe: That is right.

Mr. Mackey: And we objected to its introduction, and it wasn't offered.

Mr. Taaffe: I did not attempt to introduce it. They anticipated I would, and made an objection.

May I state this to your Honor: We have attempted to get Professor Herms' original letter, and in tracing it we find that letter was sent by Dr. Meyer to Dr. Berger. Dr. Berger enlisted afterward in the Navy and he was sent to the South Seas. He is there now. I sent a cable, which can be verified through Western Union—I first contacted the person who was in possession of Dr. Berger's files to get it. That person told me the files were so numerous that unless I knew the specific file or the specific place it might be he couldn't get it, and I then sent a cable to the South Pacific asking Dr. Berger to [170] advise me immediately collect where that file was. I have received no reply. As a matter of fact, they did not want to take the cable unless there was a good reason. I told them of this suit, and they sent the cable; we have got no reply. I am now simply trying to refresh the witness' recollection. This is Dr. Meyer's own writing on this. He wrote it in my presence and he gave it to me yesterday, and I might call your Honor's attention to the date, April 10, which is a mistake. June 10 is what it should read on there. That is obviously a typographical error.

(Testimony of William B. Herms.)

Mr. Mackey: I do not think the typographical error is so obvious, your Honor.

The Court: I will allow him to show the letter to the witness, and if he can say it refreshes his recollection as to the particular matter that you are referring to, all right. It may be that it will and it may be that it won't.

Mr. Taaffe: Maybe it won't.

The Court: I do not know of any rule of law that restricts you to documents that the witness himself has signed or issued for the refreshment of recollection. He may have his recollection refreshed by a newspaper article or anything. I think that is the correct rule on that.

Mr. Taaffe: Q. I show you that letter and ask you if that refreshes your memory.

A. May I see it, please? This letter points out, "Professor W. B. Herms advises me that the particular tick you brought to my office was a *Derma-centor andersoni*." I probably wrote no letter. It was probably handed to me, I probably examined it and telephoned to Dr. Meyer.

The Court: Q. And does this document refresh your recollection?

A. Not on that particular instance. I am sorry.

[171]

Mr. Taaffe: That is all, Professor.

Mr. Mackey: No cross-examination.

HOMER E. MARSTON

called for the plaintiffs; sworn.

The Clerk: Please state your full name to the Court.

A. Homer E. Marston.

Direct Examination

Mr. Taafe: Q. Will you state your profession, Doctor? A. Physician and surgeon.

Q. Licensed to practice your profession in the State of California?

A. In the State of California.

Q. Since what date, Doctor?

A. Since 1924.

Q. Doctor, you are a graduate of what school of medicine? A. Stanford Medical School.

Q. Since your admission to practice medicine, Doctor, where have you been engaged in the practice? A. In San Rafael.

Q. Marin County, California?

A. Marin County.

Q. Have you been engaged in the general practice of medicine in that community since 1924?

A. Yes, I have.

Q. Did you know Dr. Arthur Barr in his lifetime? A. Yes, I have.

Q. How long have you known him, Doctor?

A. Oh, probably twenty or twenty-five years.

Q. Had you had an opportunity to observe him generally prior to the onset of his fatal illness?

A. Generally, yes; never professionally.

(Testimony of Homer E. Marston.)

Q. You had never been his doctor on any occasion?

A. His family's, but I never attended him.

Q. He had never called on you in all the years you knew him [172] for any medical services to himself?

A. No, he hadn't.

Q. Although he had called on you for medical services to members of his family?

A. Yes, sir.

Q. You knew the members of his family, I take it?

A. Yes.

Q. You knew his widow, Mrs. Zeila Barr?

A. Yes.

Q. You knew his two children, Billy Barr, that is, the plaintiff in one of these actions—

A. Yes.

Q. You knew his daughter, Agnes Barr, is that so?

A. Yes.

Q. You knew other members of his family; you knew his mother?

A. Yes.

Q. You knew his brothers?

A. Yes.

Q. You were quite well acquainted with the family, is that true?

A. Yes, I have been.

Q. Was Dr. Barr a man of healthy activities, as far as you were able to observe him for twenty or twenty-five years?

A. Very much so.

Q. Did you know of his inclination for hunting and fishing?

A. Yes, I did.

Q. As a matter of fact, in that community he was well known; is that true?

A. Very well.



(Testimony of Homer E. Marston.)

Q. Had you ever known him to be sick or unhealthy prior to the onset of the fatal disease?

A. No, I never did.

Q. Doctor, when were you first called into this case? A. On June 4, 1942.

Q. And by whom?

A. By Mrs. Barr, his widow.

Q. Did you call at his home and find him there at that time? A. Yes, sir.

Q. Was he in bed? A. Yes.

Q. Did you make some investigation or observations at that time? A. Yes, I did. [173]

Q. What did you do and what did you find?

A. Well, I took a short history. He had stated that the night previous he had felt some chills and had fever. He suffered from headache—he had suffered from a headache all day, and had had some abdominal discomfort. He came home early from his office, took a cathartic, and went to bed early.

Mr. Mackey: Q. May I interrupt, Doctor, to ask you, Are you refreshing yourself with notations that you made at the time?

A. Yes, I am. I have my notes here.

Mr. Taaffe: Q. Go on, Doctor. What was done in addition to that?

A. And then he stated that “this morning”, that is, the morning that I was calling on him, the 4th, that the headache had become much more severe as well as the chills and fever, and that he ached all over his body, that is, the aches were more severe,

(Testimony of Homer E. Marston.)

and he also stated that his mind was somewhat confused, and that he had been very restless and that he had passed a very uneasy night, sleeping at very, very short intervals, and he also complained that his mouth was quite dry.

He also stated that he had gone hunting in Lassen County for antelope on the 27th of May and stayed up there until the 31st of May, and on the 31st, as they were coming out, he noticed a tick on his abdomen, and this had been removed by one of his companions, Louis Nave.

Q. Louis Nave?

A. That is the name he gave, Nave.

Q. You put the name down as Nave?

A. Nave, yes. And, incidentally, he also told me that in the history that he had seen Dr. Leroy Briggs of San Francisco on the 2nd of June 1942 for a physical check-up, and that Dr. Briggs had told him that he was all right. And then in my examination I found him to be exceedingly restless, apparently in pain. There was some [174] slight cyanosis, that is, blueness of the skin. He was somewhat confused. He had herpes of the lips.

Q. Do you mean confused mentally, Doctor?

A. Yes, somewhat. He seemed to shake himself out of it, but there was some mental confusion there.

Q. What are herpes of the lips?

A. They are little blisters, or fever blisters. His tongue was dry and coated. His abdomen was tympanitic, that is, swollen with some gas, slightly

(Testimony of Homer E. Marston.)

tender in the upper part. His temperature was 102, pulse 120, and respirations 20.

Mr. Mackey: Q. May I ask, Doctor, when this was?

A. This was the morning of the 4th of June about eleven o'clock.

Q. After admission to the hospital?

A. No.

Mr. Taaffe: No.

Mr. Mackey: This was the day before.

Mr. Taaffe: This was on the same day, but in the morning.

The Witness: Those were the positive findings. I ordered a blood count made. Would you like me to read the results of that?

Mr. Taaffe: Q. Yes, if you would, please, Doctor.

A. The white cells were 2,800; polymorphonuclears 84 per cent; eosinophiles .5 of 1 per cent; lymphocytes 15.5 per cent.

Q. You are going a little fast for us, Doctor. Polymorphonuclears were 84 per cent?

A. 84 per cent.

Q. What was next?

A. Eosinophiles were .5 of 1 per cent, lymphocytes 15.5 per cent, stabs 31 per cent.

Q. Is that an abbreviation?

A. Yes, stab nuclei. They are polymorphonuclears.

Q. Stab nuclei? A. Yes.

Q. What percentage were they?

(Testimony of Homer E. Marston.)

A. 31. Hemoglobin was 76 [175] per cent, and red blood cells 4,800,000.

Mr. Friedman: Q. What were the red blood cells?

A. 4,800,000. A sedative was prescribed for him, and then I called in to see him again about five-thirty in the afternoon of the same day, and he was markedly confused at that time and very, very restless, dehydrated——

Mr. Taaffe: Q. Will you go a little bit slow, Doctor, until we get these symptoms? At five-thirty you say he was markedly confused, is that correct?

A. Yes, very restless, dehydrated, and in extreme pain throughout his body. It was at that time that I took him to the Cottage Hospital and put special nurses on with him and gave him fluids intravenously and morphine for his pain.

On the next day, the 5th of June, I saw him at least five times, and the first time was around eight o'clock in the morning, and he was quite confused, restless, uncooperative, and seemed in great pain. More fluids were given to him intravenously and at nine o'clock Dr. A. C. Reed of San Francisco, whom I had called in consultation, arrived and we went over him together. The only positive findings with Dr. Reed were a few crepitant rales in both chests, both lungs.

Q. What are rales?

A. Well, they are sounds that you hear in the chest due to—they are a little crackling sound, as

(Testimony of Homer E. Marston.)

a rule, that you usually either find in a bronchial infection or a lung infection.

That morning his temperature was 104, pulse 130, and respirations 30.

Q. Temperature 104; pulse was what?

A. 130, and respirations 30. The urine at that time showed a medium heavy cloud of albumen; sugar one plus, casts and some blood. He was [176] unable to urinate, so we had to catheterize him, and we got it with some difficulty. This was while Dr. Reed was there.

At the same time we also—Dr. Reed and I—did a spinal puncture and sent the fluid to a laboratory in San Rafael for examination, and it was found to be negative.

A number of other blood examinations were made. His blood was tested for malaria parasites and relapsing fever. They were negative. Stool and urine examinations, that is, cultures, were made. They were negative. And then blood—oh, yes, also X-rays were taken of his chest, and the films were read by Dr. C. A. Fogarty of San Francisco. His report revealed numerous areas of consolidation through the right lung and along the main stem bronchus in the left lung. Heart showed well marked lack of muscle tone. His conclusions were a widespread pneumonia of the influenzal type.

As I said, I saw him about five times that day. He just progressively got worse, so that towards evening—well, it was around about eight o'clock in the evening of the 5th, he became unconscious. He



(Testimony of Homer E. Marston.)

had been very nervous, restless, hard to keep in bed, and did not seem to respond to any of the therapies that we were giving, that is, fluids. I also gave him some blood, 500 cc.

Q. Blood transfusion?

A. Blood transfusion, and we had to give him morphine for pain. As I say, he became unconscious by eight o'clock, and very cyanotic or blue. His respirations were quite labored so that we put him into an oxygen tent. But none of these methods or means of therapy did any good whatever and he expired the next morning, on the 6th of June, at 4:25 a. m. The diagnosis was acute bronchial pneumonia, cause unknown. [177]

Q. Doctor, did you report—

A. Could I interrupt? On the 12th of June a blood specimen was sent to the Bureau of Laboratories at Berkeley and an examination made by a Dr. Eaton, and they made blood tests or tests on this blood serum and agglutination tests for plague, tularemia and six strains of proteus, which were reported on the 15th to me as all negative.

Q. Doctor, did you report this to the State Board of Health?

A. I did report it. I do not remember whether I reported it by phone, however, or by mail.

Q. Was that before Dr. Barr's death?

A. Yes.

Q. What did you report to them concerning the nature of the case?

A. I had said that there had been a tick bite,

(Testimony of Homer E. Marston.)

and, of course, I was not sure of my diagnosis. I did not know the exact cause of death outside of the bronchial pneumonia.

Q. Doctor, were you present at the autopsy?

A. Yes, I was.

Q. It took place in the Keaton undertaking parlor in San Rafael? A. Yes.

Q. On June 9, 1942; there is no dispute about the day. A. Yes.

Q. There were several other doctors present; that is correct? A. Yes.

Q. Did you make a gross examination or gross observations at least while the autopsy was being performed? A. Yes.

Q. What condition did you observe of the lungs, Doctor?

A. It showed patches of consolidation in both lungs.

Mr. Mackey: Q. May I interrupt to ask, Mr. Taaffe, Do you have notes concerning the observations that you made at the post mortem examination? A. No, I do not.

Q. But up until that point was reached in your testimony you have refreshed your recollection by your clinical notes? A. Yes, I have. [178]

Mr. Mackey: Thank you, sir.

The Witness: I have a note here that I attended the post mortem examination, that there were patches found in the lungs.

Mr. Taaffe: Q. Doctor, do you have any opinion—answer this yes or no—as to what relationship the tick bite bears to this case? A. Yes.

(Testimony of Homer E. Marston.)

Q. And to the cause of death, that is, the terminal cause, bronchial pneumonia? A. Yes.

Q. Will you state what that opinion is, Doctor?

Mr. Mackey: If the Court please, I think he has hardly been qualified yet.

The Court: He was the attending doctor. What is the point of your objection?

Mr. Mackey: I think there is no foundation laid for him to give expert testimony.

The Court: Well, if he is a qualified doctor—maybe there isn't any basis for his opinion. I do not know what you are getting at.

Mr. Mackey: So far he has merely testified as to the diagnosis that he made. I do not know whether he knows anything about rickettsial diseases.

Mr. Taaffe: We will submit the objection.

The Court: I will overrule the objection.

Mr. Friedman: May we have the same objection subject to the same ruling?

The Court: Yes.

Mr. Taaffe: Q. Will you state, Doctor, what that opinion is?

A. I have felt that due to the history of the tick bite in an area where there have been cases reported of tick bite fever, and due to the abruptness of the onset, the mental [179] confusion, nervousness, extreme pains, incubation period of approximately three or four days—I felt that it was most likely due to tick bite.

(Testimony of Homer E. Marston.)

Q. At the autopsy, Doctor, did you notice any spots on any part of the body of Dr. Barr?

A. I did see a few pink spots—this is from recollection—on the left arm or shoulder. I don't remember how many, but the pathologist called attention to these few pink spots in that region.

Q. Were those what are known medically as petechial spots? A. They appeared that.

Q. They appeared to be petechial spots. Doctor, you spoke about your first and original observations on the morning of June 4 as including the following conditions: chills, fever, headache, abdominal discomfort, in addition to which you at that time received a history of a tick bite. Are those symptoms which you have related and which I repeated indicative of Rocky Mountain spotted fever?

A. Well, they do have those symptoms in Rocky Mountain spotted fever.

Q. Are those the symptoms that you would expect to meet or to see from a patient who related that he had been bitten by a tick and which you suspected to carry Rocky Mountain spotted fever?

A. Those would be the symptoms that you would expect to find.

Q. You have testified, Doctor, that later on that day, or, rather, I believe you said on the same morning—at least it was on the same day—that you found he was suffering from aches and pains all over the body, that he was cyanotic, that he was confused mentally, had herpes of the lips; his tongue was dry and coated, his abdomen was swollen, his tempera-

(Testimony of Homer E. Marston.)

ture 102, pulse 120, and his respiration 20—were all of those symptoms which are [180] usually found in Rocky Mountain spotted fever cases?

A. Yes.

Q. Are those the things that you would expect to find in a Rocky Mountain spotted fever case?

A. Yes.

Q. At that stage of the case? A. Yes.

Q. Doctor, you sent these blood specimens, together with the fluid taken in the spinal puncture, to various laboratories for examination, is that correct? A. Yes.

Q. They were negative, is that correct?

A. Yes.

Q. Is there any significance, in your opinion, attached to the fact that those examinations were negative? A. Do you mean all of the tests?

Q. Yes; any conclusive—

A. There was nothing conclusive about it.

Q. Is it a common occurrence or experience, Doctor, in taking blood tests, not only in Rocky Mountain spotted fever, but in many other fevers, that such tests result negatively?

A. Many times.

Q. Is it an accepted proposition of the medical profession that blood tests are not regularly relied upon? A. Not entirely so.

Q. They are not entirely relied upon in Rocky Mountain spotted fever, is that correct?

A. In early stages it is not entirely relied on, no.

Q. Doctor, you said that on the afternoon of



(Testimony of Homer E. Marston.)

June 4th he was markedly confused. Could you elaborate on that description to tell us just how far he was impaired mentally at that time?

A. Well, he was very uncooperative, and when you asked him to do things, he didn't seem to understand what you were trying to get at. He wouldn't take nourishment. He was trying to get out of bed. In fact, we had to have two nurses in there at one time to [181] watch him, because he just did not seem to know what he was doing.

Q. Is that delirium, so to speak?

A. Delirium.

Q. He was in a delirium, is that correct?

A. Yes.

Q. When did he enter the delirious stage, Doctor?

A. He was delirious when we brought him to the hospital.

Q. In other words, when you saw him at—what time was it?

A. 4:30 in the afternoon he was definitely delirious.

Q. At what time had you seen him that morning?

A. Around eleven o'clock.

Q. He was able enough to give you some history of himself at that time, that is, of his condition?

A. Yes.

Q. That afternoon at 4:30 he was in a delirium, is that correct?

A. He was in a delirium, yes.

Q. Did he ever come out of that delirium, from that time until his death on the following Saturday morning?

A. No, he did not.

(Testimony of Homer E. Marston.)

Q. In the hospital was he likewise uncooperative? A. Very.

Q. In addition to the other things was he shouting and yelling? A. Yes, he was.

Q. Quite loudly? A. Very loudly.

Q. You say on that afternoon about 5:30 you found him markedly confused, restless, dehydrated, extreme pain over the body—those are the symptoms you would expect to find in a Rocky Mountain spotted fever case at that stage of it?

A. Yes, you would.

Q. Were all of the symptoms as you have related them, his actions, indicative of Rocky Mountain spotted fever? A. Yes.

Q. Throughout the time that you had him under observation? A. Yes.

Q. You had not noticed petechial spots during his lifetime, that [182] you saw on his arm at the time of his death? A. No, I had not.

Q. Had you looked for a rash, or petechial spots, during his lifetime? A. Yes.

Q. But you did not notice any?

A. I didn't notice any.

Q. Did you notice at any time any rash or petechial spots except after death?

A. The morning Doctor Reed was there there was just a faint flushing of the skin, a redness in the upper part of his back. That was the only change that we saw.

Q. Doctor, is it or is it not a medical fact that where the onset of a disease is Rocky Mountain

(Testimony of Homer E. Marston.)

spotted fever, so sudden, or as sudden in this case, the prosecution is so fast or swift and death ensues within such a short time that rashes do not always occur?      A. That is right.

Q. That is correct, isn't it?

A. That is correct. There have been cases reported where no rash has ever been found.

Q. And where it was definitely Rocky Mountain spotted fever?      A. Yes.

Mr. Taaffe: I think that is all.

### Cross Examination

Mr. Mackey: Q. I wonder if you could tell us, Doctor, by whom those cases were reported where death occurred without a rash?

A. I couldn't tell you whom they were reported by, but I have read such.

Q. You have read that statement made by textbook authors?      A. It is possible.

Q. Have you read that in the report of the autopsy of any specific case?

A. I couldn't say if I have.

Q. I might ask you, Doctor, have you ever read Bulletin 177 that is published by the Federal Department of Health in Washington, which reviews the autopsy since 1932?

A. No, I have not. [183]

Q. Are you familiar with any other publication which reports the findings on post-mortem examination of Rocky Mountain spotted fever cases?

A. No, I have never seen any that just dealt with post-mortems.

(Testimony of Homer E. Marston.)

Q. Pardon me?

A. I have never read any that just dealt with post-mortems.

Q. Have you ever read any publication which dealt with a specific named case?

A. No; I have read that there have been cases that absolutely showed no eruption, that there had been cases reported.

Q. Now, I understand that in the first part of your testimony, which was prior to the time you mentioned the autopsy, that you were refreshing your recollection from notes that you had made at or shortly after the time of Doctor Barr's illness.

A. Yes, sir.

Q. I would just like to see those notes, and would you hand me the particular piece of paper that refers to your testimony to the effect that Doctor Barr told you that he had been bitten by a tick?

A. Well, I will show you what I have here.

Q. I just, for example, refer to that portion of the notes.

A. "When hunting in Lassen County for antelope"—

Q. Will you speak up so we can all hear you?

A. "When hunting in Lassen County for antelope on May 27, 1942, to May 31, 1942, found tick on body, on May 31, 1942, and removed it," and I have in parenthesis "by Louis Nave."

Q. He told you that the tick was removed by Louis Nave, did he, as you refreshed your recollection by your own notes?

A. Yes.

(Testimony of Homer E. Marston.)

Q. Now, I would take it, Doctor, that you base your opinion that it was likely that this pneumonia was produced by a tick bite on [184] the supposition that Doctor Barr was bitten by an infected tick, is that correct?

A. Yes, I would base my supposition on that.

Q. And if you removed that supposition from your hypothesis, what would then be your opinion as to the cause of his pneumonia?

A. Possibly an influenzal type of thing.

Q. And the clinical course was entirely compatible with what you term an influenzal type of thing, was it?

A. It could be, yes.

Q. The cyanotic condition is one that is usually encountered in a pneumonia case shortly prior to death?

A. Yes.

Q. Pains, chill and fever, are the usual characteristics of any serious febrile disease, are they not Doctor?

A. Yes.

Q. In fact, any of the manifestations which you noted of Doctor Barr at any time, from his first visit on the morning of the 11th until his death, were the same manifestations which you would expect in any febrile disease of that short a duration, were they not?

A. No, I do not think you always find the mental confusion, the extreme restlessness, and the extreme pain that one does find in Rocky Mountain spotted fever.

Q. Let me ask you, did you ever observe a case of Rocky Mountain spotted fever yourself, before?



(Testimony of Homer E. Marston.)

A. I never have, no.

Q. What do you base your opinion upon to the effect that the sensations of pain and these other manifestations which you have mentioned are more severe in Rocky Mountain spotted fever than other diseases? A. Just on what I have read.

Q. Can you tell us what you have read in that respect?

A. That the pains are most extreme——

Q. Yes?

A. (Continuing): ——throughout the body——

Q. Can you give us the name of the author who made that statement? [185]

Mr. Taaffe: Just a moment. Will you let the witness finish his statement?

The Court: I think probably the doctor did not understand his question. He did not ask him to repeat anything; he asked him for the source of his information.

A. No, I couldn't give you any source. I have read a number of articles on it.

Mr. Mackey: Q. Can you give us the names of any of them? A. No.

Q. When did you read them?

A. Oh, the last year, off and on.

Q. Since the date of Doctor Barr's death?

A. Yes; I have been interested in anything that had to do with Rocky Mountain spotted fever, and anything that came to my attention, I read it.

Q. Have you had under your supervision any

(Testimony of Homer E. Marston.)

fatal virus, atypical or influenzal pneumonias that were fatal?      A. No, I have not.

Q. Well, have you observed the complaints of one who is suffering from those diseases which had a fatality as a result?

A. No, I have not. I haven't seen one.

Q. How do you know that people who have a virus pneumonia and who succumb as soon after onset as did Doctor Barr after his do not experience pains as intense as those which are experienced in spotted fever? How do you know that to be the fact?      A. Only by what I have read.

Q. And you can't tell us the name of any author who has made a statement to that effect?

A. No, I can't.

Q. If we took a little recess would you be able to do it? Have you got your material with you?

A. No, I haven't a thing with me.

Q. Where have you your material that discloses that medical [186] information?

A. I have pamphlets in my office. I have had access to textbooks. I have seen one or two journals on the subject.

Q. What is the nature, Doctor, of the statement that is made in those pamphlets or journals, or some of them? Is it specifically to the effect that the pains in spotted fever cases are more severe than those in atypical pneumonia cases?

A. No.

Q. What do you recall were the statements that you have read?

(Testimony of Homer E. Marston.)

A. Well, that the pains are most severe; that they do not respond well to narcotics,—morphine and things of that sort; that even with large doses one is unable to relieve them and give them rest, which would seem to me that certainly the pains were most severe. I have seen a number of pneumonia cases. I have not seen any that have been fatal, but usually you can make them pretty easy with that method of treatment.

Q. That is, in the mild cases, or non-fatal cases, which you have observed, it has been easy?

A. Yes.

Q. Do you know whether it is easy to relieve the patient of pain when he has otherwise than a mild attack of pneumonia? A. No.

Q. You do not know that from your own experience? A. I have not seen one.

Q. So your statement to the effect that the pain experienced by the spotted fever patient is more severe than that experienced by the patient who dies of atypical pneumonia is not based upon any experience of your own? A. That is right.

Q. And it is not based upon any statement which you have read, in medical authorities, to the effect that the pain of spotted fever is any more severe than the pain in virus pneumonia?

A. No, I do not think I have ever seen that.

[187]

Q. Now, as I understand your testimony, Doctor, you have read a statement to the effect that the

(Testimony of Homer E. Marston.)

pain is most severe, and it is from the use of those words, "most severe," that the author meant it is more severe than in any other kind of a case?

A. No, I do not believe so; I think there are other cases, other diseases, that have pains just as severe.

Q. And among those would you enumerate, possibly, a fatal pneumonia?

A. It is possible.

Q. Aches, chills, fevers,—those are common in all febrile diseases? A. Yes.

Q. But you feel they are more severe in cases of spotted fever than in others? A. Yes.

Q. But you can't call our attention to the specific source on which you base that belief?

A. No.

Q. Now, when you were attending this case you called in Doctor Reed as your associate?

A. Yes.

Q. You had observed the man's body pretty closely before his death, had you not? A. Yes.

Q. You made a conscientious and thorough examination of his skin? A. Yes.

Q. And there were no blotches or petechia anywhere on his body while he was in the hospital?

A. No, there were none.

Q. Doctor Moody testified this morning that a petechial rash resembles a bruise.

Mr. Taaffe: Just a moment.

That was not his testimony.

Mr. Mackey: I will submit to the record on that.

(Testimony of Homer E. Marston.)

Mr Taafe: I will submit to the record on that, too. Doctor Moody explained afterwards that petechia were spots only; that he was speaking of the hemorrhagic areas. That is exactly [188] what he said when he was describing it.

Mr. Mackey: Exactly, Mr. Taafe.

Mr. Taafe: Not petechia.

Mr. Mackey: I beg to differ with you in this respect; that he explained petechia as that particular phase of a rash which results from the seeping of the blood into the surface of the body when the occlusion and thromboses of the vessel has occurred.

Mr. Taafe: The infiltration of the blood, he said, into a small spot. He described it afterward when I asked him the question. He said, "I meant by bruises those large hemorrhagic areas."

Mr. Mackey: Rather than arguing the point at length——

Q. Let me ask you this: Does a petechial rash resemble a bruise?

A. It does when the petechiae join together sometimes. My understanding of it, it would resemble a bruise.

Q. In other words, if the rash were no longer discreet and had run together——

A. Confluent.

Q. (Continuing): ——it resembles a bruise?

A. Yes.

Q. You spoke of seeing a rash on the left shoulder.

A. The left shoulder, as I recall.



(Testimony of Homer E. Marston.)

Q. At the autopsy? A. Yes.

Q. And that rash was not on the decedent at any time prior to his expiration?

A. I didn't see it if it were.

Q. But you made a careful examination of his body? A. Yes.

Q. And of that portion of his body. Now, in your studies on Rocky Mountain spotted fever have you come to any conclusion as to where a rash in that disease first appears?

A. Well, it first appears on the wrist and ankles.

[189]

Q. And then does it spread?

A. And then it spreads up the arm, the legs, and onto the rest of the body.

Q. And while this man was in the hospital he had no rash on his ankles or arms?

A. No, he did not.

Q. Can you describe for the Court the nature of this rash which you first saw in the deltoid area at the post-mortem?

A. They were little pink spots.

Q. Little pink spots. And were they run together? A. No.

Q. They were distant?

A. They were distant.

Q. Did you examine them closely?

A. Yes, I looked at them fairly closely.

Q. In your opinion, did they result from the handling of the body?

(Testimony of Homer E. Marston.)

A. It is possible. I was quite surprised when I saw them.

Q. And during some portion of the embalming process?

A. It is possible, because I had not seen them before in the hospital.

Q. In your opinion, may a sound diagnosis of spotted fever be based solely on clinical manifestations?

A. Sometimes one has to make diagnoses of symptoms.

Q. In this particular case I suppose you were familiar with the findings that the pathologist made, are you?

A. No, I have never seen a report.

Q. Well, Doctor Moody testified this morning that none of the peripheral blood vessel pathology characteristic of Rocky Mountain spotted fever was present, and he also testified that he could not demonstrate rickettsia in any of the post-mortem specimens. Does that present, in your opinion, Doctor, one of these instances where you must diagnose a disease solely on the basis of clinical manifestations, or do we have in this case [190] other factors—and by them I refer to the findings by the pathologist—do we have other factors on which any sound diagnosis should be based, as well as upon clinical signs?

A. No. I based my own mostly on the history and the course of his disease, although there was

(Testimony of Homer E. Marston.)

no rash. There were no serological tests that were constant. My opinion was based on the history.

Q. The serological tests in no way created any inference that he did have spotted fever, did they?

A. No, they did not.

Q. And you exclude from the hypothesis upon which you reach your diagnosis any of the things that were revealed by microscopic examination of the tissues of the decedent, do you not?

A. I do not know what they were, except as you have told me now.

Q. Supposing you take my word for it, that the microscopic examination of the peripheral blood vessels failed to show any proliferations, occlusions, or thromboses, in the arterial blood vessels of the body.

A. It might not show any, if there had been no eruption, because those are the areas where you are most likely to find that condition.

Q. Is the rash, in your opinion, the result of the proliferations in the blood vessel?

A. No; it is due to hemorrhage into the tissue.

Q. What are the respective stages of the pathology in the blood vessel in cases of spotted fever? Do the hemorrhages come first?

A. No.

Q. The proliferations come first, do they not?

A. The proliferations—I am not too clear on that; I am not expert on pathology.

Q. That is correct, according to Doctor Moody's testimony; the [191] proliferations come first, and

(Testimony of Homer E. Marston.)

then, as that process, which is, as I believe, the multiplication of cells, is it not, Doctor?—

A. Yes.

Q. (Continuing): —as that process proceeds, it breaks down and clogs up the blood vessel; that would be the occlusion?

A. Thrombosis, yes.

Q. And that would be followed eventually by the thrombosis, is that correct? A. Yes.

Q. And it would be at the time of the thrombosis that you would have, I think they call it, an extravasation of the blood into the tissues?

A. Yes.

Q. That would be the time that the rash would appear, is that correct?

A. The petechiae, yes. I do not think petechiae are the same as the pink spots that you get early.

Q. Yes, I think that might be right; but in any event you may have the characteristic blood pathology of spotted fever, you could have the initial stages of that pathology, that is, the proliferation without the petechiae, which you say is the result of the subsequent process in the blood vessel, namely, the thrombosis, is that correct?

A. Yes.

Q. Let us assume, Doctor, that the testimony shows that there were no proliferations of the endothelium in the body of Doctor Barr; taking that fact into consideration, would you alter your diagnosis, which has heretofore been based solely on

(Testimony of Homer E. Marston.)

clinical signs? Is that additional fact, hypothetically, of course, entitled to any weight?

A. I think it does bear some weight.

Q. Would it bear enough weight to in any way cause you to alter your opinion?

A. Yes, it certainly would have an effect.

Q. And if it were a fact that a proper examination of Doctor Barr's peripheral blood vessels revealed that he had none of the [192] original pathology, namely, the proliferations, would you still be willing, simply on the basis of the clinical facts that you saw, and upon the possibility that he may have been bitten by a tick that was infected, would you still, as a professional man, tell this Court that it was your opinion that a tick bite was more likely the cause of this man's death?

A. I think——

Q. Will you answer that yes or no, first?

A. It is known that there always is proliferation in the terminal vessels in tick bite fever?

Q. I beg your pardon, sir, but I am not being examined.

Mr. Taaffe: Will you let the witness answer the question? He was right in the middle of a sentence when he was interrupted by the remark of counsel.

Q. Will you please answer the question, Doctor?

A. Well, if it is a proven fact that you always find this proliferation in Rocky Mountain spotted fever, that is, in the terminal blood vessels, and if there were none there, why, of course, it would alter my opinion.



(Testimony of Homer E. Marston.)

Mr. Mackey: Q. What is your opinion as to whether or not those proliferations are always present? A. I do not know.

Q. You already testified that death may occur before the occurrence of a rash? A. Yes.

Q. You have read that statement?

A. Yes.

Q. You could not support it by the authorities from which you read it? A. That is right.

Q. But you also conceded that death might occur before the appearance of a rash, but after the proliferations, which are not the cause of the petechial rash; you so testified, did you not?

A. Will you state that again, please? [193]

Q. Well, you testified that the petechial rash is the result of the thromboses of the blood vessels.

A. Yes.

Q. That is correct, is it not? A. Yes.

Q. And the thromboses, we all know, is two or three stages in the pathology removed from the original proliferations, is it not? A. Yes.

Q. Therefore, it would be sound to say that you could have proliferations without petechial rash?

A. Yes.

Q. Now, you say you do not know whether or not you can have death without proliferations?

A. Yes.

Q. That is a subject upon which you are entirely in the dark? A. Yes.

Q. And your reading has not tended to assist you in coming to any conclusion on that point?

(Testimony of Homer E. Marston.)

A. That is right.

Q. Now, are you then able, with any degree of conviction whatever, to make a diagnosis, or to express an opinion in a case like this, where it is known that there were no proliferations or other lesions of the peripheral vessels—are you still willing to say that you will diagnose this case as a spotted fever case solely on the clinical manifestations?

A. I think I could have that opinion without——

Q. Can you refer us to any text in which the author regards the clinical manifestations as a sound base upon which to diagnose spotted fever?

A. No; they always wanted to get all of the manifestations, if possible, but——

Q. Isn't it a fact, Doctor, that the bulk of the authority, if not, in fact, the uncontradicted authority, is to the effect that the only helpful clinical manifestation is the characteristic rash?

A. Yes.

Q. Sometimes that is not there?

A. Yes. [193-a]

Q. But clinically, isn't that the only thing to which you can attach a great deal of importance?

A. Yes, it is, as a rule, found. I merely stated that there are cases in which there has been no eruption.

Q. And your reading has led you to that conclusion?

A. Yes, my reading has.

Q. Pardon me, sir—has led you to the conclu-

(Testimony of Homer E. Marston.)

sion that in the vast majority of the cases rash does appear before death?      A. Yes, it does.

Q. And that death without rash is a rare and unusual occurrence?      A. Yes.

Q. Now, what kind of a white blood count, generally, accompanies a spotted fever case?

A. It runs, as a rule, between 8,000 and 12,000 and higher. I think the average is between 8,000 and 12,000 white cells.

Q. From your testimony it would appear that Doctor Barr had a very definite leucopenia?

A. Very definitely.

Q. In fact, he had only 2,800?      A. Yes.

Q. From your reading have you come to any conclusion as to what the characteristic growth pathology of the spleen in spotted fever cases is?

A. Yes; the spleen, as a rule, is enlarged and tender.

Q. And palpable?      A. And palpable.

Q. Even clinically you can feel it bulging out?

A. Yes.

Q. That is almost invariable, is it not?

A. Yes.

Q. In western cases, an accompaniment of spotted fever?

A. In most cases that you read about.

Q. Were you able, when you had this man in the hospital, to palpate his spleen?

A. No: we were unable to palpate it.

Q. You noticed, at the autopsy, did you not, that his spleen was [194] not enlarged?      A. Yes.

(Testimony of Homer E. Marston.)

Mr. Mackey: I think that is all.

Mr. Friedman: Q. Doctor, you referred to petechial rashes, and so forth. What is a petechial rash?

A. It is an extravasation of blood into the soft tissue, from the blood vessel.

Q. In giving your opinion to the question Mr. Taaffe asked you, as I understand it, you said in substance that due to the history of a tick bite, the abruptness of the onset of the disease, the period of incubation, and the pains, that Doctor Barr's death was most likely due to tick bite? A. Yes.

Q. Did I sum up your testimony correctly?

A. Yes.

Q. I am only referring to it as a basis for the next question. A. Yes.

Q. Considering all these things that you have included in your opinion and answer, is it not also possible that his death could have been from some other cause? A. It could have.

Q. And I believe, as you told Mr. Mackey, the opinion and conclusion that you have arrived at you would not have arrived at if there had been no history of tick bite? A. That is very likely.

Q. Is not delirium generally associated with high fever? A. In many cases, yes.

Q. You have referred to the fact that you have done some reading, which I gather from your testimony you have done as a matter of interest in the death of Doctor Barr. A. Yes.

(Testimony of Homer E. Marston.)

Q. You have no recollection of the various textbooks you have read, that is, the authorship of those books?      A. No.

Q. Nor of such bulletins or pamphlets that you may have in your office?      A. No. [195]

Q. Is there any way you have of refreshing your recollection on those readings? Have you read many volumes on it?      A. Many what?

Q. Many volumes.      A. No.

Q. Just a few? How many would you say?

A. Oh, I suppose I have read eight or ten articles on Rocky Mountain spotted fever.

Q. Anything else?

A. That is, articles in pamphlets or one or two textbooks.

Q. But you can't think of the name of one?

A. No, I do not recall the names.

Q. Do you think your memory could be refreshed if you were shown a list of publications?

A. It might be.

Q. Have you any of these available?

A. No, I have none with me.

Q. I do not mean here; I mean in your office.

A. Yes, I believe I have.

Q. Would it be putting too great a burden on you, Doctor, to ask you to look at the ones you have to see if they contain any statement about this rash, or the absence of rash?

A. I would be glad to do it.

Q. You might arrange with Mr. Taaffe by some means to come here as a result of that examination.



(Testimony of Homer E. Marston.)

A. I would be glad to do it.

Mr. Taaffe: I will gladly go over the matter with the doctor and submit the names of any articles or treatises on the subject. Then, I take it, in that connection, Mr. Friedman, if we are not to recall him back——

Mr. Friedman: I did not say we would not; I said we might not.

Mr. Taaffe: If we don't, we might read over many of those articles to substantiate that point.

[196]

Mr. Mackey: As far as that is concerned, we will enter into no such arrangement. We might go out and get a hundred articles he has not read.

Mr. Friedman: He can make a report of his findings to us, and I want doctors' articles.

The Court: Anything else?

Mr. Friedman: Q. Doctor, when did you form the opinion that the tick bite might have caused this death?

A. Well, I suspected it when the history was first given to me, that he had been bitten by a tick; that is one reason why I had called in Doctor Reed. I had never seen a case, and I believe that he had seen some, that he knew more about it than I did, so that is why I felt I needed consultation.

Q. I see; so that you had a suspicion of that?

A. Yes, I did.

Q. And that suspicion matured into a definite opinion at the time the man died, or subsequently?

A. Yes, I had had that suspicion right along.

(Testimony of Homer E. Marston.)

My opinion has never been real definite. I felt it was most likely that he died of that. It is possible that he did not. One of the workers over at Berkeley at the Department of Laboratories told me in that neighborhood where he had been hunting there had been cases of Rocky Mountain spotted fever. There also had been cases of plague, and that sort of thing.

Mr. Mackey: If the Court please, I think that should go out as hearsay.

The Witness: I am just telling you why I was suspicious.

Mr. Friedman: Q. I am asking you——

A. And why I felt that that was most likely the cause of his bronchial pneumonia. [197]

Q. But you are not at all certain at this time?

A. No, I am not.

Q. You simply feel that it was more likely to be that than something else? A. That is right.

Q. That is the sum and substance of your present state of mind, isn't it? A. Yes.

Q. Doctor, as the attending physician, you signed the death certificate of Doctor Barr, did you not? A. Yes.

Mr. Friedman: I think that is all.

The Court: Anything else, Mr. Taaffe?

Mr. Taaffe: Just one question.

#### Redirect Examination

Mr. Taaffe: Q. Doctor, do the symptoms and signs vary where death results after a short illness,

(Testimony of Homer E. Marston.)

from those where the illness is prolonged, in Rocky Mountain spotted fever?

A. You may not find all the signs in a fulminating case.

Q. This was a fulminating case, wasn't it?

A. This was what we call a fulminating case. He was overcome by the toxemia and you might not find all the signs.

Q. So that he was dead within 48 hours after you saw him?

A. Yes; I saw him on the 4th and he was dead on the 6th, less than 48 hours.

Q. His complaint to you, in the matter of the history which you took, was that the night before, the evening before, he did not feel well, he went home early; so this was within 72 hours of the time that we indicated that he felt bad, is that correct?

A. Yes.

Mr. Friedman: I think, if the Court would permit me, as part of the cross examination of this witness, I would like to offer a certified copy of the death certificate. [198]

The Court: Admitted.

(The death certificate referred to was received in evidence and marked Defendant's Exhibit B.)

Mr. Taaffe: May I ask one more question? I forgot to ask this. I made a note of it.

Q. Is bronchial pneumonia associated as a terminal cause of death with Rocky Mountain spotted fever?

A. Yes, it is.

(Testimony of Homer E. Marston.)

Q. So reported in the works on the subject, is that correct? A. Yes.

Mr. Taaffe: That is all.

### Recross Examination

Mr. Friedman: Q. It is likewise associated with many other diseases as the terminal cause of death?

A. Yes.

Q. In other words, it is a complication of many diseases, a secondary result? A. Yes, it is.

Q. The mere fact that there was a pneumonia, standing by itself, is no indication of what predisposing cause may have been of the pneumonia?

A. No.

Mr. Mackey: Q. Can you refer us, Doctor, to any text or authority which is to the effect that you may have pneumonia as a result of tick bite, without a precedent spotted fever?

A. I do not believe I said that.

Q. No; I said can you refer us to any text?

A. No.

Q. You know of no such case ever having occurred? A. No.

Mr. Mackey: Thank you.

The Court: We will take a short recess at this time.

(Recess.)

Mr. Taaffe: Mr. Nave was under cross examination.

The Court: Had you completed your cross examination of this witness, Mr. Friedman? [199]

(Testimony of Homer E. Marston.)

Mr. Friedman: I do not think I have any further questions.

The Court: Of this witness?

Mr. Friedman: No, your Honor.

Mr. Mackey: With your Honor's permission I would like to cross examine the witness briefly. .

The Court: Very well.

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LOUIS NAVE,

recalled for the plaintiffs; previously sworn.

Cross Examination

Mr. Mackey: Q. Mr. Nave, was Arthur Barr at any time confined to bed with a bad cold during this hunting trip?

A. With a cold?

Q. Yes.

A. No, not that I know of. Probably had a cold.

Q. He probably had a cold?

A. Well, since the time I knew him he might have had a cold off and on, but that particular time——

Q. I am referring to the time when you were hunting with him in Lassen County.

A. Lassen County? No.

Q. No sign of a cold? A. No, not at all.

Q. When you got to the third day of the hunting had he shown any signs of a cold? A. No.

Q. Was he coughing? A. No.

Q. Was he sneezing?

A. No, not that I know of.



(Testimony of Louis Nave.)

Q. Was his nose running?

A. No, I don't remember.

Q. Was he frequently blowing his nose?

A. I don't keep track of that. I don't know if he was blowing his nose or not.

Q. Are you sure he did not have a bad cold while he was up there?

A. He wasn't coughing, nothing like that. He didn't complain of anything. [200]

Q. But he might have been sneezing frequently?

A. Well, not that I remember.

Q. You are pretty sure he was not?

A. No, I wouldn't say that; I don't know.

Q. This rash that you noticed that was heavy on the wrists and which faded from the upper part of the arm, what did it do in the other direction, towards the hand?

A. What do you mean?

Q. Did the rash extend over his hands?

A. Well, I didn't pay particular attention to that. He just called my attention to it, and I saw his wrist and his arm, and I saw he had this spot on him. I asked him what it was. He said, "I don't know. I guess it's nervousness." And that is all. I just went about reading the paper.

Q. Had you ever seen that kind of rash on him before on any hunting trips?

A. No.

Q. Did he ever have any rashes before, to your knowledge?

A. No, not that I know of.

Q. You were with him at all times until he returned to San Rafael, except when he went fishing early on the morning of the 1st?

A. Yes.

(Testimony of Louis Nave.)

Q. Did he still have the rash on his way home?

A. No, he didn't say anything about it.

Q. Was it a rash which you, yourself, would not have noticed had he not called your attention to it?

A. Well, I was reading a paper. I was in bed. I never looked him over. If he hadn't called my attention to it I wouldn't have known it.

Q. I am still not clear as to whether he had a rash on his hands.

A. Well, I didn't examine him. As I said, I noticed he had a rash on here (indicating), on his arm. Of course, I couldn't [201] say from there up. He had a paper in his hand, reading.

Q. At least, you did not notice any rash on his hands as he returned to San Rafael?

A. No, I didn't even give it a thought to look at it.

Q. I will hand you what purports to be a statement which you signed, and I will ask you if that is your signature, Mr. Nave?

A. Yes, that is my signature.

Q. I will call your attention to the second paragraph of that statement. Will you read that over, please (handing document to the witness)?

A. I didn't write that.

Q. Did you read that statement before you signed it?

A. No; he just asked me the questions and I didn't know what he was writing.

Q. This statement was signed by you in the presence of Mr. Tulak?

(Testimony of Louis Nave.)

A. Who? I didn't—

Q. Mr. Tulak.

A. I didn't know him. Who is Tulak?

Q. He is a representative of the Equitable Assurance Society.

A. The man who wrote that down—I was working—he asked me questions, he was writing, and then he asked me to sign it.

Q. Did you read it over? A. No.

Q. Didn't you read it over and call certain misstatements in it to his attention?

A. Not that I remember of.

Q. Let me call your attention to the second page, where the initials "L. N." appear, where changes have been made. Are those your initials? At each of the places?

A. Yes, those are my initials.

Q. But you would say you did not read that statement before you signed it?

A. I don't remember reading it. It is so long ago I don't remember it. I might have read it. I don't know.

Q. And in paragraph 2 of this statement there appears (reading): [202]

"Doctor Barr has been troubled with hay fever for several years, and on Saturday, May 30th, he mentioned that it was bothering him. I noticed that his nose was running and that he was blowing his nose frequently. This was the last day of the hunt."

Does that tend to refresh your recollection as to

(Testimony of Louis Nave.)

whether he was suffering with some respiratory troubles at that time?

A. Oh, I don't know—if he had hay fever, he may have blew his nose.

Q. Was he blowing his nose frequently?

A. I couldn't say that.

Q. Was his nose running?

A. I never looked at it. His nose might have been running, but I couldn't distinguish whether he had a runny nose, a cold, or a hay fever; I don't know.

Q. And you signed this statement, yourself, to the effect that his nose was running, and that he was blowing his nose frequently, without reading it?

Mr. Taaffe: When was that statement sent in, counsel?

Mr. Mackey: June 10, 1942.

Mr. Taaffe: June 10th?

Mr. Mackey: Yes.

A. I might have read it. I don't remember. It was so long ago.

Mr. Mackey: I offer that in evidence, your Honor.

Mr. Taaffe: No objection.

The Court: Defendant's Exhibit C.

(The statement referred to was received in evidence and marked Defendant's Exhibit C.)

The Court: Is that all?

Mr. Mackey: Yes.

The Court: Anything further? [203]

Mr. Taaffe: No, your Honor.

MRS. GERTRUDE H. RICHARDSON,

called for the plaintiffs; sworn.

The Court: Q. Please state your full name.

A. Gertrude H. Richardson.

Direct Examination

Mr. Taaffe: Q. Your occupation is that of housewife, Mrs. Richardson?

A. Yes.

Q. You are a lady of family? A. Yes.

Q. Your family consists of what?

A. Two sons.

Q. Your husband and two sons? A. Yes.

Q. And you are a resident of San Rafael, Marin County? A. Of Ross.

Q. Ross, Marin County. You are, and have been, a friend of the Barr family for many years, is that correct? A. Yes.

Q. And a frequent visitor to the home of Doctor Barr, and since his death to the same home where his widow still resides, is that correct?

A. Yes, it is.

Q. Mrs. Richardson, on the evening of June 1st, if that was the date, 1942, when Doctor Arthur Barr returned from the antelope hunting trip, were you at his home? A. Yes, I was.

Q. Who was there with you at that time?

A. Mrs. Barr and her mother, Mrs. Heydenfeldt.

Q. Mrs. Zeila Barr and Mrs. Heydenfeldt, the mother of Mrs. Zeila Barr, is that right.

A. Yes.



(Testimony of Mrs. Gertrude H. Richardson.)

Q. At that time did you see any rash on any part of the body of Arthur Barr?

A. Yes, I did.

Q. Will you state the circumstances under which you saw that rash and where it was? [204]

A. We had been discussing the trip. He was telling us about the trip. And he said that, "I am going upstairs now and take a shower." And he started out of the room, and he said, "I have this rash on the back of my legs." And he pulled up his trousers and showed us the rash.

Q. Where was the rash?

A. On the calf of his leg, from the knee down.

Q. How far down, about?

A. Oh, maybe half-way down. I wouldn't know exactly. But it was on this—from the knee down.

Q. Was it on one leg or two legs?

A. On two—on both legs.

Mr. Taaffe: That is all.

#### Cross Examination

Mr. Mackey: Q. He pulled up his trousers on both legs to show you the rash?

A. Yes, he pulled up one, and then the other.

Q. And that rash extended half-way from the calf to the ankle?

A. From the knee down, I would say, yes.

Q. Where did it stop?

A. Maybe half-way down the calf of the leg.

Q. You did not see any rash at any lower point?

A. I didn't notice any other.

Q. What did the rash look like?

(Testimony of Mrs. Gertrude H. Richardson.)

A. Well, it was rather a spotty looking rash. I didn't look at it very closely, but it was quite red, and I would say spotty looking.

Q. Did he at that time say that the rash was due to nervousness?

A. No, he didn't say what it was due to.

Q. Do you know whether he was allergic to rashes? A. What is it?

Q. Do you know whether he ever had had rashes before? [205] A. No, I do not know.

Q. What was the color of the rash?

A. Red.

Q. Did it consist of spots?

A. Yes; rather spotty.

Q. I beg your pardon?

A. It was quite spotty; spotted, I would say.

Q. How large were the spots?

A. Well, gave the impression of being solid, and it was—I mean, they were very close, I would say.

Q. Do you mean that each unit of the rash was merged into a whole, or an entire area of redness?

A. Well, it would just give the impression of being red in the back of his leg.

Q. Did it look like sunburn?

A. No, I don't think it would be like sunburn.

Q. Can you compare it to anything that you have ever seen? A. I didn't hear that.

Q. Could you compare it to anything with which we are familiar? A. Nothing I had ever seen.

Q. You never saw anything like it before?

A. No.

(Testimony of Mrs. Gertrude H. Richardson.)

Q. Wherein did it differ from any rash that you had ever seen before?

A. The only rashes I had seen before would be measles on my children.

Q. And this did not look anything like that?

A. I didn't think it resembled that.

Q. Was it a very heavy rash?

A. I wouldn't say very heavy, not so that it would——

Q. Did it resemble sunburn in any way?

A. No, I don't think you would call it sunburn.

Q. Did you see him subsequent to that day, or that evening?

A. It was more like little blistery bumps.

Q. Did you see Mr. Barr the next day?

A. No; I didn't [206] see him the next day.

Q. Did you see him at any time thereafter, before he became ill?

A. I saw him—no, I saw him the day he became ill, Thursday. He was, I would say, in a coma, almost, when I saw him then. That was Thursday afternoon.

Mr. Mackey: That is all.

Mr. Friedman: Q. When did you say you saw this rash? What day was it?

A. That was on Monday, I believe, the day he returned from his trip.

Q. You say this rash had little bumps on it?

A. Yes, that is what I would say.

Q. Did it look like hives?

A. Not as large as I would know hives.

(Testimony of Mrs. Gertrude H. Richardson.)

Q. Well, you can't say it had the protruding effect as hives—raised? There were raised spots?

A. That is the way it looked, just like little bumps.

Q. You did not examine it very closely, did you?

A. No, I didn't examine it very closely.

Q. In ther words, all the doctor did was pull up his trousers, say, "Look, I have this rash." You took a look at it, and that was the end of it?

A. That was the last.

Mr. Friedman: That is all.

Mr. Taaffe: That is all, Mrs. Richardson, thank you.

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### MRS. GRACE HEYDENFELDT,

called for the plaintiffs; sworn.

The Clerk: Q. Your full name, please?

A. Grace G. Heydenfeldt.

#### Direct Examination

Mr. Taaffe: Q. Mrs. Heydenfeldt, you are the mother of Mrs. [207] Zeila Barr? A. I am.

Q. And Arthur Barr was your son-in-law, is that correct? A. Yes.

Q. Were you at the home of your daughter and Doctor Barr on Monday, I believe it was, June 1, 1942, the day on which he returned from the ante-lope hunting trip? A. Yes, I was.

Q. Who was at that home with you at that time?

A. Well, Mrs. Richardson was there, and, I

(Testimony of Mrs. Grace Heydenfeldt.)

don't know, there were quite a few others. I didn't know all their names.

Q. Was your daughter there?

A. Yes, she was home.

Q. Did you see any rash on Doctor Barr's body on that day?

A. Well, on the back of his leg—he pulled up and said he had a rash on the back of his legs, and then he was going up to take a shower, and it was all on the back of his leg, a red rash.

Q. On one leg or both legs? A. Both legs.

Q. How far down his legs, or just at what place on his legs was that rash?

A. Just on the calf of his legs around the back. I didn't notice particularly, but it looked to me like the measles.

Mr. Taaffe: That is all.

#### Cross Examination

Mr. Friedman: Q. You say it looked like measles? A. It did to me.

Q. Did it look like hives?

A. No, it looked like a rash that had broken out like the measles, or something like that.

Q. You mean by that that there was any pus coming out of this rash?

A. Of course, I was off at a distance, and I didn't scrutinize it enough to know exactly about that, but it looked like a red rash.

Q. Most rashes are red.

A. It looked like a measles rash, [208] something like that—just broken out. I didn't see any pus.



(Testimony of Mrs. Grace Heydenfeldt.)

I didn't examine it. He just said the rash had broken out on his legs and he was going to take a shower.

Q. A measles eruption without pus looks just the same as hives, doesn't it?

A. As far as I know, hives always comes in big blotches. I have never seen hives like that. I know quite a few who have had hives, and they come in big blotches, as big as a dime.

Q. And these were small, pimply-like eruptions?

A. Well, they were smaller than the hives rash.

Q. By the way, had you ever seen any rash on Doctor Barr before?      A. No, I never had.

Q. Did you ever know him to have a rash?

A. No.

Q. Did you ever know that he was allergic to certain foods to produce hives on him?

A. No, I never heard him to complain of anything. I thought he was absolutely healthy.

Q. You do know that he was allergic to certain things that would produce a rash?      A. No.

Q. You did not know that?

A. I never did.

Mr. Friedman: That is all.

Mr. Mackey: Q. Did these spots coalesce or run together?

A. No, no, they were just like a rash breaking out on anybody all over; just general, all over. They weren't anything that was noticeable one way or the other.

(Testimony of Mrs. Grace Heydenfeldt.)

Q. Like a cluster of small red dots?

A. Yes, just like a lot of rash all over.

Q. Did you ever see a rash that resulted from chafing?

A. No, not particularly.

Q. Did you ever see a rash that resembled this one, that you noted?

A. Well, it was reddish—it was kind of a very red [209] rash—I think redder than anything I had ever seen before.

Q. How far from the doctor were you when you noted the rash?

A. About as far away as I am from you.

Q. And he pulled up both of his trouser legs to his knees?

A. I don't know whether he pulled them up to his knees; he pulled them up a way, and then he said he was going up and take a shower, and that he had the rash on his legs. He didn't go into detail at all.

Q. Did you know, like Mrs. Ricardson, that that extended only about half-way down from the calves to the ankles?

A. Well, I couldn't testify to that, because we didn't so observe. I just saw he had a rash on his legs, and I didn't scrutinize it. He just said he had the rash and he was going up and take a shower.

Q. Did you see that rash on him at any subsequent time?

A. No, because I went home that next morning and I didn't see him again.

(Testimony of Mrs. Grace Heydenfeldt.)

Mr. Mickey: That is all.

Mr. Friedman: Q. May I ask one or two additional questions? They are rather minor. What time was this at night?

A. It was in the afternoon, I think.

Q. How was the doctor dressed?

A. He had on his old clothes, old hunting clothes.

Q. He still had his old hunting clothes on?

A. Yes.

Q. Did he have shoes or boots on?

A. Oh, I don't remember now on that. I know he had on a dark kind of hunting trousers. I don't know what they were. Kind of dark clothes. And he had a plaid kind of jacket on. I didn't notice particularly.

Q. He had some foot cover? A. Yes.

Q. Shoes, so far as you remember?

A. Yes. [210]

Q. He had socks on? A. Yes.

Q. Did he have these heavy woolen socks?

A. I couldn't tell you that for sure.

Q. You do not know what kind of socks?

A. That I couldn't tell you, because I didn't observe that particularly. I just noted—he said he had the rash, and he went up for the shower, and that is about all I know about it.

Q. If he had on socks, they came up somewhat on his legs, did they not? A. Yes.

Q. About how far up, would you say?

(Testimony of Mrs. Grace Heydenfeldt.)

A. Well, I really didn't notice all of them. I just noticed—he said he had the rash, and I looked at it, but I didn't scrutinize it enough to tell you the inches up and down.

Q. Isn't it a fact, Mrs. Heydenfeldt, all you remember is he said he had the rash, he pulled up his pants, you noticed his legs were red, and that was about all? A. Yes.

Q. About what time of the day was this?

A. It was before dinner. I don't know exactly what time, whether it was half-past four or five; I didn't notice the time at all.

Q. You would say it was somewhere between 4:00 and 6:00?

A. Yes, somewhere before dinner.

Q. As I understand it, you were about the distance from the doctor as you are now from Mr. Mackey? A. Yes, just about.

Q. A distance of some 12 or 14 feet?

A. Yes, just about.

Mr. Friedman: That is all.

Mr. Taaffe: The next witness will be longer than five minutes, your Honor.

The Court: Let us go a little longer. [211]

MRS. ZEILA BARR,

called for the plaintiffs; sworn.

The Clerk: Q. Your name is Zeila Barr?

A. Zeila Barr.

Direct Examination

Mr. Taaffe: Q. Mrs. Barr, you are the widow of Doctor Arthur Barr, is that correct?

A. Yes, that is.

Q. And you are the plaintiff in the action against the Equitable Life Assurance Society of America, is that correct? A. Yes, that is.

Q. William H. Barr and Agnes D. Barr, Plaintiffs, through you as their guardian, in the action against the Travelers Insurance Company, are your children, is that correct?

A. Yes, that is correct.

Q. And Doctor Barr was the father of those children, is that correct? A. He was.

Mr. Taaffe: I take it there is no question—I do not remember what the state of the pleadings is—that Mrs. Barr was appointed the guardian ad litem? There is no question about that?

Mr. Mackey: I know of none.

Mr. Taaffe: Due to their minority, and the like.

Q. How old is your son, William Barr, the plaintiff?

A. He was just 18 on the 27th of September.

Q. On the 27th of last month?

A. Last month.

Q. And he is in the United States Navy as an



(Testimony of Mrs. Zeila Barr.)

apprentice seaman, having enlisted when he was 17 years old, is that correct, several months back?

A. Yes, he did, in June.

Q. And he has not been in the courtroom, and the reason for it is he has been engaged in his naval duties, is that so? [212]

A. Yes.

Q. How old is Agnes Barr, your daughter and co-plaintiff?

A. She is 16.

Q. She was in the courtroom today earlier?

A. Yes, she was.

Q. She has gone home since?

A. Yes; I seen her home.

Q. How long were you and Doctor Barr married, Mrs. Barr?

A. It will be 19 years November 11th.

Q. 1943, is that correct?

A. This year, yes.

Q. And you lived at Forbes and High Streets, and you still live at Forbes and High Streets, San Rafael, California, is that true?

A. Yes, that is.

Q. Doctor Barr has been a dentist ever since you married him, throughout your married life, and for some years prior to that time, is that correct?

A. Yes.

Q. How old was he at the time of his death?

A. Fifty-two, I think.

Q. What was his condition of health? Was he a healthy individual?

A. Very healthy.

Q. You have heard the witnesses describe his outdoor activities as a hunter and a fisherman, is that correct?

A. Yes, that is correct.

(Testimony of Mrs. Zeila Barr.)

Q. If we may summarize that subject and leave it, he practically lived for his family and to hunt and fish? A. Yes.

Q. He hunted and fished throughout the open seasons, whenever during any part of the year they were open, is that true? A. That is true.

Q. Strong physically? A. Very.

Q. And an exceptionally good walker, is that correct? A. Yes, it is.

Q. Do you remember the occasion of his leaving on this antelope [213] trip about May 26 or May 27, 1942? A. Yes, I do.

Q. For Ravendale, or in the vicinity of Ravendale, Lassen County, California, is that so?

A. Yes.

Q. Were you in the home when he returned from that hunting trip on Monday, June 1st?

A. Yes, I was there.

Q. About what time of the day did Doctor Barr return?

A. Well, I would say it was around 5:00 or 5:30. It was before dinner.

Q. Were Mrs. Richardson and your mother there at that time? A. Yes, they were there.

Q. Mrs. Heydenfeldt? A. Yes.

Q. Did you observe a rash, or did you see a rash on any part of the body of Doctor Barr at that time? A. Yes, I did.

Q. State the circumstances under which you saw it.

(Testimony of Mrs. Zeila Barr.)

A. Well, we were talking, and he decided to take a shower, and just as he was going upstairs he pulled up his pants legs and showed us this rash on his leg.

Q. What did that rash look like to you, as you remember it?

A. Well, it was red and, I don't know, rather pimply, I thought.

Q. That is the only description you can give, is that correct?      A. Yes, it is, about.

Q. About where on his legs was that rash located?

A. Well, it was down under the knee cap and right about here (indicating). He pulled up his trousers, the old jeans, and it seemed to be down in back here (indicating), and he said it was under the knee cap at the time.

Q. You have indicated a point down to the middle of the calf, the middle of the leg, is that correct?

A. Yes; from there up.

Q. Some questions were asked by Mr. Friedman of your mother as [214] to what kind of footwear Doctor Barr had on on that occasion.      A. Yes.

Q. Do you remember what he then wore, or customarily wore?

A. Yes. I think he had on his shoes, a pair of black high shoes—you know, not too high, just old-fashioned shoes he had on.

Q. Did his stockings go above the calf of his leg?

A. Oh, no, he wore short wool socks.

(Testimony of Mrs. Zeila Barr.)

Q. By the way, he wore, as a rule, long underwear, didn't he? A. Yes, he did.

Q. Did he pull up his long underwear, that is, pants, at the time he showed the rash?

A. He did, yes.

Q. I think we will go from that point, jump ahead just a little bit. Did you call that rash, or did you tell Doctor Marston when he was called in on this case on the following Thursday, about the rash you had seen?

A. Yes, I did. That was the first thing I told Doctor Marston, that he complained of a rash.

Q. Did you look for the rash at that time with Doctor Marston? A. Yes, I did.

Q. Was the rash there on Thursday morning when you and Doctor Marston looked for it?

A. No, nothing to amount to anything.

Q. It was gone, is that it? A. Yes.

Q. Did Doctor Barr at any time after his return from that antelope hunting trip make any complaints concerning his health on the trip, that he had been ill to any extent whatsoever?

A. No, he did not.

Q. Do you remember what Doctor Barr did on Tuesday, the day after he returned from the antelope hunting trip?

A. The next day he went to the City. [215]

Q. For what purpose? What expressed purpose?

A. Well, he wanted to buy some new clothes, and he wanted a checkover by Doctor Briggs.

(Testimony of Mrs. Zeila Barr.)

Q. Did he say that he was sick or ill, in connection with his desire for a checkup?

A. No; he just felt he wanted a checkup, that was all.

Q. Did he come to the City the next day, or at least leave for the City?      A. Yes, he did.

Q. As a matter of fact, you tried to make the appointment for him with Doctor Briggs' office, is that correct?      A. Yes.

Q. And did he buy some new clothes on that day when he came to the City, on Tuesday?

A. Yes, he bought some shoes. I know he came home with shoes.

Q. Do you know whether he bought any clothing?

A. I don't know. In the excitement afterward I think a hat came to the house, but I am not positive. I am pretty sure, because I still have it there.

Q. Apparently a brand new hat, is that it?

A. Yes.

Q. He did buy a new pair of shoes on that trip to the City?      A. Yes, he did.

Q. And brought that home with him himself?

A. Yes, and brought those home.

Q. Did he make any statement concerning his condition of health that night when he came home, on the day on which Doctor Briggs examined him?

A. Yes, he did. He came home, and he was very happy. Doctor Briggs told him he was perfectly—he was a perfect specimen, so he told us, for a man of his age.



(Testimony of Mrs. Zeila Barr.)

Q. Do you remember him kidding, or what you thought was kidding, what a wonderful specimen he was?

A. Yes, he was laughing; he was kidding. [216]

Q. Having visited Doctor Briggs on Tuesday, June 2, 1942, what did he do, if you remember, on Wednesday, June 3, 1942?

A. He went to the office that day.

Q. His dental offices were in San Rafael?

A. Yes.

Q. In the Alberts Building?

A. In the Alberts Building, yes.

Q. Did he come home for lunch that day?

A. No, he did not.

Q. What was his custom about coming home for lunch?      A. He never did.

Q. He ate down town in San Rafael as a rule?

A. Yes.

Q. You live down in the residential district of San Rafael?      A. Yes.

Q. What time did he come home that evening after the day's work in the office?

A. I would say around 5:30 or a quarter to 6:00; around that time.

Q. Was that around his usual hour?

A. Well, sometimes he came home later—6:00 it was, about.

Q. He had no exact hour at which he came home?      A. No, he did not.

Q. Do you remember what his actions were that

(Testimony of Mrs. Zeila Barr.)

evening at home, just with reference to supper, for instance?

A. Yes; he didn't touch his supper. He just pushed everything to his side.

Q. Did he make any statements as to why he was not eating?

A. He said he was not feeling well.

Q. Did you observe his appearance at that time?

A. Yes; his face was very flushed.

Q. By "flushed," do you mean very red?

A. Very red.

Q. By the way, Doctor Barr's face was very sun-tanned from his outdoor life, is that correct?

A. Yes. [217]

Q. And was quite dark, is that correct?

A. Yes, he was.

Q. His face was quite dark, his skin?

A. Yes, his skin.

Q. It was naturally dark, and that was increased——

A. Oh, yes, very much.

Q. By the sun, from his outdoor activity, is that so?

A. Yes.

Q. By the way, when, prior to his visit to Doctor Briggs' office, was Doctor Barr last attended by any physician, that you can remember?

A. Well, I can't remember, unless it was 1930 or 1931 that he was operated on for appendicitis.

Q. For a hernia, wasn't it?

A. And a hernia.

Q. For appendicitis and a hernia?

A. For appendicitis and a hernia.

(Testimony of Mrs. Zeila Barr.)

Q. That was by Doctor Coffey in San Francisco, is that correct?      A. Yes, it was.

Q. And with the exception of the operation for appendicitis and hernia in 1930 or 1931, had you ever known him to be attended by a doctor?

A. No.

Q. By the way, did Doctor Barr, at any time when he was talking about this rash on his leg, mention anything about a rash that he had seen on his wrist or arms in Reno?      A. No.

Q. Well, I will—the answer is no. There was no other rash mentioned. He did not mention—I will ask her this question—did he mention to you in connection with that rash that he had had a tick bite?      A. No, he did not.

Q. He did not. By the way, you did not sleep with him in the same room on the night of Wednesday, June 3rd, did you?      A. No, I did not.

Q. You and your mother had attended a graduation in San Francisco, is that correct?

A. Yes, I went to the City. [218]

Q. Of a girl friend, is that so?

A. Well, yes; my niece.

Q. Your son, Billy, slept in the same room in a twin bed with Doctor Barr that night when you were absent over in the City, is that correct?

A. Yes, that is correct.

Q. What was Doctor Barr's custom concerning the hour when he arose in the mornings?

A. Well, anytime from 7:30 on he was always up.

(Testimony of Mrs. Zeila Barr.)

Q. Did he sometimes rise earlier than that—  
6:00 to 6:30? A. Oh, yes.

Q. Very frequently? A. Very frequently.

Q. Did he get out of bed Thursday morning,  
June 4th, at his usual hour?

A. No, he did not.

Q. Did you know that there was anything wrong  
with him up to about 8:00 or 8:30 that morning?

A. No, I did not.

Q. Did the children get up at their usual hour?

A. Yes.

Q. Which is about what?

A. Well, they have to be in school around 8:00  
or 8:30.

Q. And you got them off to school?

A. Yes.

The Court: Mr. Taaffe, is it necessary to go over  
all of this matter? It is not altogether pleasant  
for her to go over, it seems, unless you have some  
additional fact that you think is necessary.

Mr. Taaffe: No, it is not. I am just leading up  
to the point where she discovered this illness. In  
other words, they asked these detailed questions  
about everything, and I want to trace it, because I  
expect these things to be asked on cross examina-  
tion. I will get to the point.

Q. When, on the morning of Thursday, June  
4th, did you first know there was something wrong  
with Doctor Barr?

A. Well, when he did not come downstairs for

(Testimony of Mrs. Zeila Barr.)

breakfast, and I [219] ran upstairs to see what was the matter with him.

Q. What was his condition when you went upstairs?

A. Well, I thought he was very sick.

Q. Did you ask him if he was going to work?

A. No, I did not. I just ran and phoned the office and said Doctor Barr would not be there.

Q. What did you notice about his condition that caused you to feel that he was sick?

A. Well, his face was still so terribly red, and he didn't pay much attention to me.

Q. Did you ask him questions? A. Yes.

Q. Did you get answers to the questions?

A. Yes, I got some answers, but he didn't seem to care much.

Q. Did you then call a doctor?

A. Yes, I did.

Q. About what time did you attempt to get the doctor?

A. Well, I must have tried right after that to get the doctor, and it was quite awhile before—he was out already on his calls.

Q. What time did he come there?

A. Well, it must have been around 10:30 or 11:00.

Q. Were you present when Doctor Marston was examining Doctor Barr that morning?

A. Yes.

Q. Did you hear questions asked of Doctor Barr by Doctor Marston? A. Yes, I did.



(Testimony of Mrs. Zeila Barr.)

Q. Was Doctor Barr able to answer all the questions, or did he answer all the questions that were asked him?      A. At times he did.

Q. And other times he did what?

A. He just didn't pay any attention.

Q. Do you remember some of the questions that were asked that morning and the answers that he gave or did not give? [220]

A. Well, I know Doctor asked him if he were in pain, and he said yes. And he asked him if it were war nerves, and he shook his head. He paid no attention to him. I remember the doctor asking him that—he said, “Are you listening to the war? Is it too much for you?” And he just wouldn't answer him.

Q. Did he take his temperature at that time?

A. Yes, he did.

Q. He did not state what it was?

A. No, he did not tell me.

Q. Did he prescribe certain things for you to do during the day for him?      A. Yes.

Q. And you carried out those instructions?

A. Yes.

Q. Throughout the day he became progressively worse, is that correct?      A. Yes, he did.

Q. Until late in the afternoon——

A. Doctor came back again, yes. I sent for him.

Q. Shortly after Doctor Marston left that morning did you try to get Doctor Briggs, also, on the phone?      A. Yes, I did.

Q. He had left for the East?

(Testimony of Mrs. Zeila Barr.)

A. He had gone east, the secretary told me.

Q. Did you administer certain medicines which had been prescribed that day? A. Yes, I did.

Q. Was he taken to the hospital in an ambulance that afternoon? A. Yes.

Q. Did you ever see him again alive after he was taken to the hospital?

A. Well, I was at the hospital many times, but they would not allow me in the room.

Q. Did you stand in the hallway and look in there? A. Yes.

Q. Did you observe what his condition was——

The Court: Do you have to go into all this?

Mr. Taaffe: No, your Honor. I do not think it is necessary.

Q. On the day of the autopsy, or the day before, did you find a [221] tick on Doctor Barr's clothes?

A. Yes, I did; I found a tick.

Q. On what part of his clothing?

A. It was on his—well, a shirt, I guess, that he had taken off.

Q. What did you do with that tick?

A. Well, his brother came in just at that time, and I said, "I think I have found a tick."

Q. You put a tick in a glass?

A. In a glass, yes.

Q. And then you afterwards delivered the tick to your brother-in-law, Mr. Ferguson, Lieutenant Commander Ferguson, is that correct?

A. He took it, yes.

The Court: Q. Is Mr. Ferguson your brother?

(Testimony of Mrs. Zeila Barr.)

A. No; my brother-in-law.

Q. It is your sister that is married to him——

A. No; Doctor Barr's sister was married.

Mr. Taaffe: I think that is all.

Mr. Mackey: I have no questions.

Mr. Friedman: No questions, your Honor.

Mr. Taaffe: I have one or two matters I want to check in the morning. I won't be but a few minutes in the morning, and I will finish.

The Court: You will have your witnesses tomorrow?

Mr. Friedman: We will be prepared to proceed in the morning.

The Court: The Court will adjourn until tomorrow morning at 10:00 o'clock.

(Whereupon an adjournment was taken until Thursday, November 4, 1943, at 10:00 o'clock a. m.) [222]

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Thursday, November 4, 1943,

10:00 o'clock A. M.

The Clerk: Barr versus Travelers Insurance Company and The Equitable Life Assurance Company.

Mr. Taaffe: In this matter, may it please your Honor, subject to a check of the insurance policies and the possible offer of them in evidence—I think they are in the pleadings here—we will rest our case.

The Court: I do not quite understand what you mean.

Mr. Taaffe: I have not checked the pleadings, but I believe the pleadings contain the insurance policies.

The Court: I have the answers.

Mr. Taaffe: One answer does, definitely, and I believe the other, from the slight check I made——

The Court: You want to offer the policies in evidence?

Mr. Taaffe: Not if the pleadings admit they are the policies. I say subject to that we rest our case.

The Court: Is that your reservation, to offer the policies in evidence if the pleadings——

Mr. Taaffe: If the pleadings do not admit them—I believe they do. That is my recollection of the state of the record.

(Plaintiffs rest.)

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Mr. Friedman: At this time, if it please the Court, on behalf of the Defendant Travelers Insurance Company, and pursuant to the rule of the Supreme Court governing procedure in civil cases in the United States District Court, I move the Court for an order dismissing the action on the ground that neither under the law nor the facts is the plaintiff entitled to any relief in this case. To state it in another manner, it is our contention [223] that the plaintiff in this case has not sustained the burden of proof and has not established,

not only by that degree of evidence required by law, but, as a matter of fact, by any competent evidence, that the death of Doctor Barr was due to external violent and accidental means, within the meaning of the double indemnity provisions of this policy.

(Discussion on the motion.)

Mr. Mackey: If the Court please, on behalf of Equitable Life Assurance Society, we make the same motion and on the same grounds, and we concur thoroughly in the argument made by counsel, and I do not desire to make any extended argument, but I would like to point out one or two things to your Honor.

(Discussion on the motion.)

The Court: Gentlemen, if there were a scintilla of evidence in this matter, speaking colloquially of the rule that we used to learn about, I would favor the cause of the plaintiff here, because, after all, he paid for the insurance policy and should get the benefit of it. But despite my inclination in the matter and my opinions about it, after all, we have to be guided by the rules of law, and there is a burden of proof, Mr. Taaffe, that the plaintiff has to sustain. You have to have some evidence upon which the Court can find that there is a liability, or, at least, a *prima facie* case. It seems to me that the only evidence before the Court is the fact that the decedent was bitten by a tick. In the last analysis that is all we have. If we had added to that some medical opinion in which a doctor would testify that in his opinion the cause of death was



due to the disease being produced by the bite of this tick, then we might have enough to make a *prima facie* case.

All that Doctor Marston said was that it is most likely [224] that that was the cause of death, but it could have been caused by other causes.

Judge St. Sure has pretty well covered that situation in this case he has decided. There is no evidence at all; even no indication. If I had the feeling from the evidence in this case, Mr. Taaffe, that this man's death was due to the disease induced by the tick bite, I would consider it further and deny the motion of the defendants. But everything about the facts in this case, so far as the plaintiffs' case is concerned, leads me to believe that there really is not anything that you can put your finger on that, in a court of justice, would lead a trier of facts with an open mind to the conclusion that this man's death really was induced by a disease caused by the bite of a tick, because there is nothing but conjecture and speculation.

Doctor Marston, the witness who offered the strongest grounds on your behalf, if they exist, admitted an unfamiliarity with the thing, but that from what he read, if the man had been bitten by a tick, it was likely that that was the cause of death. But I can't see my way clear to say that that is a sufficient showing of the necessary facts.

Now, it is unfortunate that you do have a burden of proof. It may be, as you say, at the time this thing happened, that a different method of investigation might have produced some fact that would have gotten by this barrier of the burden of proof.

That is just one of those unfortunate things that happens. We have to take these cases as we find them, as they come, and if the facts are not there, they are not there, and the result is unfortunate.

It seems to me we can't make a determination in a court of law on that basis. I am convinced that there isn't any evidence [225] at all that sustains the burden of proof, much as I would like to find, frankly, some evidence to support the plaintiffs' claim in this case; but it just does not square with my conscience that any of those facts have been proved. It is possible that they might have been proved if you had an opportunity to make an investigation at the time, but, as I say, we have to take the situation as we find it.

I find myself compelled to grant the motion of the defendants for judgment.

Mr. Taaffe: Before taking formal action on it, if it please your Honor, if your Honor will pardon the interruption, I may have the opportunity of checking on those insurance policies, and it may be considered if I find that the pleadings are not complete on that subject, I can offer the policies in evidence?

The Court: If you have anything to present to clear your record or to add to your record in the matter, I will reopen the matter for that purpose.

Mr. Taaffe: For that purpose. It will only be in connection with the policies. That is understood, your Honor.

The Court: Yes.

[Endorsed]: Filed Feb. 2, 1944. [226]

In the District Court of the United States for the  
Northern District of California, Southern Di-  
vision

No. 22609 G

WILLIAM H. BARR, a minor, and AGNES D.  
BARR, a minor, by ZEILA H. BARR, their  
guardian,

Plaintiffs,

vs.

THE TRAVELERS INSURANCE COMPANY,  
Defendant.

### NOTICE OF APPEAL

Notice is hereby given that William H. Barr, a minor, and Agnes D. Barr, a minor, by Zeila H. Barr, their guardian, the plaintiffs in the above entitled action, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the Final Judgment and Order of Dismissal heretofore, to-wit, on the 10th day of November, 1943, given, made and entered in and by the District Court of the United States for the Northern District of California, Southern Division, in the above entitled action, and from the whole of said Judgment, which said Judgment is in the words and figures following, to-wit:

“The above entitled action (consolidated with the case of Zeila Barr v. The Equitable Life Assurance [227] Society of the United States, No. 22613 R) having come on regularly for trial before the above entitled court, sitting without a jury, on November 2, 3, and 4, 1943, the plaintiffs being rep-

resented by John J. Taaffe, Esq., their attorney, and the defendant being represented by Messrs. O'Connor, Neubarth and Moran and Leo R. Friedman, Esq., its attorneys, and on said last mentioned date, the plaintiffs having completed the presentation of their evidence and having rested their case in chief, the defendant moved the above entitled court, under and pursuant to Rule 41(b) of the Rules of Civil Procedure for the District Courts of the United States, for a dismissal of the above entitled action on the ground that upon the facts and the law the plaintiffs had shown no right to relief, and plaintiff having objected to said motion and the motion having been argued by counsel for plaintiffs and counsel for defendant and the same having been submitted to the court for decision and the court finds that said motion is meritorious and should be granted and that under the law and upon the facts and the law the plaintiffs have shown no right to relief;

“It is hereby Ordered, Adjudged and Decreed that this court does hereby order, adjudge and decree that plaintiffs take nothing by reason of their complaint on file herein and that the above entitled action be and the same is hereby dismissed.

“Dated: November 10, 1943.

LOUIS E. GOODMAN,

United States District Judge.”

Dated: January 31, 1944.

KEITH R. FERGUSON,

JOHN J. TAAFFE,

Attorney for Plaintiffs.

[Endorsed]: Filed Jan. 31, 1944. [228]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL

Now come the above named plaintiffs, and, pursuant to the provisions of Subdivision D of Rule 75 of the Federal Rules of Civil Procedure, file this, their Designation of the Points on which they intend to rely on their Appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit Court.

1. That the said District Court erred in granting the motion of defendant for dismissal of said action under Rule 41B of the Rules of Civil Procedure for the District Courts of the United States.

2. That the said District Court erred in ruling that upon the facts and the law plaintiffs had shown no right to relief.

3. That the said District Court erred in finding that the [229] said motion was meritorious and that upon the facts and the law plaintiffs had shown no right to relief.

4. That the evidence introduced and received upon the trial of said cause established prima facie the right of plaintiffs to judgment as prayed for in their complaint on file herein, all of which from the reporter's transcript of the testimony and proceedings at the trial on file herein fully and at large appears.



Dated this 31st day of January, 1944.

JOHN J. TAAFFE,

KEITH R. FERGUSON,

Attorneys for Plaintiffs and  
Appellants.

Receipt of a copy of the foregoing Statement of Points is hereby acknowledged this 31st day of January, 1944.

JOS. T. O'CONNOR,

LEO R. FRIEDMAN,

Attorneys for Defendant and  
Appellee.

[Endorsed]: Filed Feb. 2, 1944. [230]

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[Title of District Court and Cause.]

DESIGNATION OF CONTENTS OF RECORD  
ON APPEAL

Come now the above named plaintiffs, and, pursuant to the provisions of Rule 75 of the Federal Rules of Civil Procedure file this, their Designation of the portions of the Record, Proceedings and Evidence to be contained in the Record on their Appeal herein to the United States Circuit Court of Appeals for the Ninth Circuit:

1—The caption.

2—The names and addresses of counsel.

3—The complaint.

4—The order of removal of the cause from the Superior Court of the State of California, in and

for the City and County of San Francisco, to the United States District Court for the [231] Northern District of California, Southern Division.

5—The answer of defendant.

6—The order consolidating the action for trial with action numbered 22613 R entitled “Zeila Barr, plaintiff, vs. The Equitable Life Assurance Society of the United States, defendant”.

7—Judgment and order of dismissal.

8—The notice of appeal.

9—The designation of contents of record on appeal.

10—Statement of points on which appellant intends to rely on the appeal.

11—The full and complete reporter’s transcript of the evidence and proceedings at the trial.

Dated this 31st day of January, 1944.

JOHN J. TAAFE

KEITH R. FERGUSON

Attorneys for Plaintiff and  
Appellant.

Receipt of a copy of the within Designation of Contents of Record on Appeal acknowledged this 31st day of January, 1944.

JOS. T. O’CONNOR

LEO R. FRIEDMAN

Attorneys for Defendant and  
Appellee.

[Endorsed]: Filed Feb. 2, 1944. [232]

[Title of District Court and Cause.]

COUNTER-DESIGNATION OF CONTENTS OF  
RECORD ON APPEAL

Comes now The Travelers Insurance Company, appellee in the above entitled action, and files herewith its counter-designation of the parts of the record which it deems necessary for the consideration of the appeal of the above-entitled action.

1. The petition for removal of cause to the United States District Court.

2. Notice of petition for removal to the United States District Court (with bond for removal).

Dated: February 15th, 1944.

O'CONNOR, NEUBARTH &  
MORAN

LEO R. FRIEDMAN

Attorneys for Appellee

Receipt of Service.

[Endorsed]: Filed Feb. 16, 1944. [233]

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[Title of District Court and Cause.]

ORDER ENLARGING TIME TO FILE  
RECORD AND DOCKET CASE

Good cause appearing therefor,

It Is Hereby Ordered that the plaintiffs in the above entitled action, who have heretofore appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the Judgment and Order of

Dismissal heretofore given and made in this cause in and by this Court, may have and they are hereby granted to and including the 8th day of April, 1944, in which to file the Record of Appeal and docket the case in the said Circuit Court of Appeals.

Dated: March 3, 1944.

LOUIS E. GOODMAN

Judge United States District  
Court

[Endorsed]: Filed Mar. 3, 1944. [234]

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District Court of the United States  
Northern District of California

**CERTIFICATE OF CLERK TO TRANSCRIPT  
OF RECORD ON APPEAL**

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 234 pages, numbered from 1 to 234, inclusive, contain a full, true and correct transcript of the records and proceedings in the case of William H. Barr, Etc., et al., Plaintiffs, v. The Travelers Insurance Company, Defendant. No. 22609-G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on appeal is the sum of Twenty-five dollars and thirty-five cents (\$25.35) and that the said amount has

been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 6th day of April, A. D. 1944.

(Seal)

C. W. CALBREATH

Clerk

By WM. J. CROSBY

Deputy Clerk.

---

[Endorced]: No. 20728. United States Circuit Court of Appeals for the Ninth Circuit. William H. Barr, a minor and Agnes D. Barr, a minor, by Zeila H. Barr, their guardian, Appellants, vs. The Travelers Insurance Company, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

Filed April 7, 1944.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals  
for the Ninth Circuit.



In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10728

WILLIAM H. BARR, a minor, and AGNES D.  
BARR, a minor, by ZEILA H. BARR, their  
guardian,

Appellants,

vs.

THE TRAVELERS INSURANCE COMPANY,  
Appellee.

---

ZEILA BARR,

Appellant,

vs.

THE EQUITABLE LIFE ASSURANCE SO-  
CIETY OF THE UNITED STATES,  
Appellee.

ORDER CONSOLIDATING APPEALS FOR  
HEARING

The causes entitled as above having been consolidated for trial in the District Court, and the same evidence and proceedings in said District Court having been introduced upon the one trial as to both causes, and the questions presented by each of said appeals being the same and there being no necessity for printing the said evidence in separate transcripts; and counsel for the respective parties having stipulated thereto; it is therefore

Ordered that said appeals be consolidated for hearing in one transcript consisting of the pleadings and judgment roll in each of said actions, together with the several notices of appeal and the several designations of the portion of the record to be used on said appeal, and the several statements of the points relied upon by the appellants on said appeal with a single transcript of the testimony and proceedings taken and had in the said District Court on the trial of said consolidated actions.

Dated this 11th day of February, 1944.

CURTIS D. WILBUR

United States Circuit Judge

The foregoing Order is hereby consented to.

JOHN J. TAAFE

KEITH R. FERGUSON

Attorneys for Appellants.

JOS. T. O'CONNOR

LEO R. FRIEDMAN

Attorneys for Appellee, The  
Travelers Insurance Com-  
pany.

PILLSBURY, MADISON &  
SUTRO

NORBERT KORTE

Attorneys for Appellee, The  
Equitable Life Assurance  
Society of the United States

[Endorsed]: Filed Feb. 11, 1944. Paul P.  
O'Brien, Clerk.

[Endorsed]: Re-Filed Apr. 7, 1944. Paul P.  
O'Brien, Clerk.

In the United States Circuit Court of Appeals  
for the Ninth Circuit

No. 10728

WILLIAM H. BARR, a minor, and AGNES D.  
BARR, a minor, by ZEILA H. BARR, their  
guardian,

Appellants,

vs.

THE TRAVELERS INSURANCE COMPANY,  
Appellee.

STATEMENT OF THE POINTS ON WHICH  
APPELLANTS INTEND TO RELY ON  
APPEAL

Now come the above named appellants and pursuant to the provisions of Section 6 of Rule 19 of this Court file this, their Statement of the Points on which they intend to rely on the appeal and designate herewith the parts of the record which they think necessary for the consideration thereof. In this behalf the said appellants hereby adopt their Statement of Points on which Appellants Intend to Rely on Appeal filed in the District Court of the United States for the Northern District of California, Southern Division, the Court from which this appeal is taken, which said statement is a part of the Record on Appeal in the above entitled cause; and appellants hereby designate all of the said Record on Appeal as necessary for the consideration of said appeal.

Dated, this 8th day of April, 1944.

KEITH R. FERGUSON

JOHN J. TAAFE

Attorneys for Appellants

Receipt of a copy of the within Statement is hereby acknowledged this 8th day of April, 1944.

O'CONNOR, NEUBARTH &

MORAN

LEO R. FRIEDMAN

Attorneys for Appellee

[Endorsed]: Filed April 8, 1944. Paul P.  
O'Brien, Clerk.





No. 10,728

IN THE

**United States Circuit Court of Appeals**

**For the Ninth Circuit**

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WILLIAM H. BARR, a minor, and AGNES D.  
BARR, a minor, by Zelia H. Barr, their  
guardian,

*Appellants,*

VS.

THE TRAVELERS INSURANCE COMPANY,

*Appellee.*

**BRIEF FOR APPELLEE,  
THE TRAVELERS INSURANCE COMPANY.**

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JOSEPH T. O'CONNOR,

LEO R. FRIEDMAN,

Russ Building, San Francisco 4,

*Attorneys for Appellee,*

*The Travelers Insurance Company.*

**FILED**

FEB 20 1944



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No. 10,728

IN THE  
**United States Circuit Court of Appeals**  
**For the Ninth Circuit**

---

WILLIAM H. BARR, a minor, and AGNES D.  
BARR, a minor, by Zelia H. Barr, their  
guardian,

*Appellants,*

vs.

THE TRAVELERS INSURANCE COMPANY,

*Appellee.*

**BRIEF FOR APPELLEE,**  
**THE TRAVELERS INSURANCE COMPANY.**

---

**STATEMENT OF THE CASE.**

Appellants instituted this action (together with consolidated action of Barr v. The Equitable Life Assurance Society, No. 10,729) in the Superior Court of the State of California for the purpose of recovering the double indemnity provision of \$10,000 under a policy providing for the payment thereof in the event that (Dr.) Arthur Barr, the insured, died and such death "resulted from bodily injuries effected directly and independently of all other causes through external, violent and accidental means". (R. 10.)



Dr. Barr died on June 6, 1942. Appellants contended that such death was caused by "external, violent and accidental means". Appellee denied that such was the fact (R. 30), and this was the sole issue presented at the trial. (R. 46.)

The ordinary insurance of \$10,000 had been paid prior to the institution of the action. (R. 47.)

The action was removed from the state Court to the federal District Court for trial on petition of appellee. (R. 19-28.)

At the conclusion of appellants' case, appellee made a motion for an order dismissing the action under Rule 41(b) of the Rules of Civil Procedure for the District Courts of the United States. (R. 272.) The motion was granted (R. 275) and a judgment and order of dismissal was accordingly made and entered. (R. 34.) The appeal is taken from such judgment and order. (R. 276.)

---

#### **APPELLANTS' THEORY OF THE CASE AND CONTENTIONS ON APPEAL.**

It was the theory of appellants, in the trial Court, that Dr. Barr while on a hunting trip was bitten by a tick in either Lassen County, California, or in Reno, Nevada; that such tick was of the species known as *Dermacentor andersoni*; that such species of tick is the vector or transmitting agent of Rocky Mountain spotted fever; that the tick bite infected Dr. Barr with the disease which, in turn, produced a pneumonia from which the assured died. Such is also appel-

lants' contention on this appeal. (Appellants' Opening Brief, pp. 20-21.)

Appellants contend, on this appeal, that the judgment of dismissal was erroneous and should be reversed for the following reasons:

1. That a proceeding under Rule 41(b) is analogous to a motion for a nonsuit and, under the doctrine announced in *Erie R. R. Co. v. Tompkins*, 304 U. S. 64, 82 L. ed. 1188, the law of California must be followed in determining such motion.

2. That in California a motion for nonsuit must be denied if there is any evidence making out a *prima facie* case for plaintiff.

3. That the evidence introduced at the trial made out a *prima facie* case of death by accidental means, *ergo*, the Court erred in ordering and making a judgment of dismissal.

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#### APPELLEE'S CONTENTIONS.

Appellee contends that the judgment and order of dismissal should be affirmed for the following reasons:

1. A proceeding under said Rule 41(b) is not analogous to a motion for a nonsuit in the California Courts.

2. The doctrine announced in *Erie R. R. Co. v. Tompkins*, *supra*, applies only to matters of substantive law and has no application to mere matters of procedure.

3. A judgment of dismissal under Rule 41(b) must be affirmed if there is substantial evidence for its support.

4. Even if the California rule as to nonsuits be applicable there was no evidence making out a *prima facie* case of death resulting from the bite of an infected tick.

5. The appellants failed to sustain the burden of proving a death by accidental means as claimed, in the following particulars:

(a) There was no proof that the tick which bit Dr. Barr was of the species *Dermacentor andersoni*;

(b) There was no proof that the tick which bit Dr. Barr was an infected tick, even if it be assumed it was of the species *Dermacentor andersoni*;

(c) There was no proof that the assured had the pathology of Rocky Mountain spotted fever;

(d) The clinical findings, as proved by appellants, do not establish Rocky Mountain spotted fever.

6. The evidence established that Dr. Barr died of an atypical pneumonia of the virus or influenzal type, produced by causes other than Rocky Mountain spotted fever.

## ARGUMENT.

1. THE DOCTRINE ANNOUNCED IN *ERIE R. R. CO. v. TOMPKINS* APPLIES ONLY TO MATTERS OF SUBSTANTIVE LAW AND DOES NOT APPLY TO MATTERS OF PROCEDURE.

Appellants contend that as the case was removed from a state Court to the Federal Court the law of the state must be applied and, it being contended that a motion for dismissal in the federal Court under the rule being analogous to a motion for nonsuit in the state Court, the motion must be denied if the evidence, being construed most strongly in favor of appellants, makes out a *prima facie* case in their behalf, such being the law of California relative to nonsuits.

It has definitely been decided that the rule in the case of *Erie R. R. Co. v. Tompkins* applies only to matters of substantive law and has no application to matters of procedure, such latter matters being within the control of the federal Courts.

Our Supreme Court in *Sibbach v. Wilson*, 312 U. S. 1, 85 L. ed. 479, has decided this matter as follows:

“Congress has undoubted power to regulate the practice and procedure of federal courts, and may exercise that power by delegating to this or other federal courts authority to make rules not inconsistent with the statutes or Constitution of the United States; but it has never been essayed to declare the substantive state law, or to abolish or nullify a right recognized by the substantive law of the state where the cause of action arose \* \* \*”  
(312 U. S. at 9, 85 L. ed. at 483.)

The Supreme Court then announces the test to be applied as follows:

“The test must be whether a rule regulates procedure,—the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress for disregard or infraction of them.” (312 U. S. at 14, 85 L. ed. at 485.)

In closing the Supreme Court stated:

“\* \* \* it is to be noted that the authorization of a comprehensive system of court rules was a departure in policy, and that the new policy envisaged in the enabling act of 1934 was that the whole field of court procedure be regulated in the interest of speedy fair and exact determination of the truth. The challenged rules comport with this policy.” (312 U. S. at 14, 85 L. ed. 485.)

Rule 41(b) of Civil Procedure for the District Courts reads:

“After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.”

Clearly the foregoing rule relates to a mere matter of procedure under the test announced in the fore-



going case. The rule relates to “the judicial process for enforcing rights and duties recognized by substantive law”.

If the Court procedure—the judicial process—for enforcing a right conferred by substantive law of a state does not include the manner and method by which the existence of the right is to be determined, then every case removed from a state to a federal Court for trial must adopt the state procedure in those instances where the litigant would be entitled to insist that such procedure be followed if the case had not been removed. In California a litigant is entitled to a verdict if three-fourths of the jury concur in his favor; a litigant is entitled to a jury selected from the county; he is entitled to a definite number of peremptory challenges; a judgment of nonsuit is not an adjudication on the merits, etc. In the federal Courts a jury verdict must be unanimous; a jury panel may be selected from several counties; the number of peremptory challenges differ; a dismissal under the rule is an adjudication on the merits. If appellants’ contention be sound then every case transferred to a federal from a state Court must be tried according to such rules of procedure as prevail in the state. Such is not the law.

**2. A JUDGMENT OF DISMISSAL MUST BE AFFIRMED IF THERE IS SUBSTANTIAL EVIDENCE TO SUPPORT IT.**

It is settled that a judgment of dismissal under Rule 41(b) is to be affirmed on conflicting evidence when there is any substantial evidence to support findings in favor of defendants.

*Young v. United States* (CCA-9), 111 F. (2d) 823, 825;

*Gary Theatre Co. v. Columbia Pictures Corp.* (CCA-7), 120 F. (2d) 891, 892.

In the instant case there is no conflict in the evidence. There is no competent evidence in favor of appellants.

---

**3. THE ASSURED HAD NONE OF THE CHARACTERISTIC PATHOLOGY OF SPOTTED FEVER.**

Appellants do not contend that tick bite directly induced the pneumonia. At pages 20-21 of their brief they declare the assured "was suffering from Rocky Mountain spotted fever, which developed into pneumonia, which latter disease was the terminal cause of death".

In his opening statement to the trial Court, appellants' counsel announced that he would prove that pathologists demonstrated rickettsiae in tissues taken from the assured at the autopsy. (R. 41.) The appellants not only failed to make any such proof, but by their own witnesses affirmatively showed that there were no lesions of rickettsiae in the assured's body.

Rickettsiae are minute bacterium-like organisms which live and multiply only in living cells. (Tr. 185.) Infection results from transmission by bite into the human blood stream. (Tr. 140.) During the first week from onset some rickettsiae should still be found in the blood stream. (Tr. 115, 125.) Samples of the assured's whole blood, taken midway between onset and death and kept in a refrigerator until delivery to the laboratory (R. 101-2), were subjected by the State Health Department to standard laboratory tests for the purpose of detecting rickettsiae. Each of these tests failed to demonstrate any trace of rickettsiae in assured's blood stream. (R. 110, 126.)

Dr. Merrill, chief of the Division of Laboratories, State Health Department, testified:

“A. Three lines of investigation were followed: The blood was cultured into culture media in an attempt to demonstrate any pathogenic bacteria that might be present. The blood stream was tested for its agglutinant activity against known cultures or known organisms, and laboratory animals, guinea pigs, were inoculated with the whole.

Q. The result of all those tests was what?

A. Our cultures were negative; our agglutination tests were negative; and our animal inoculations were negative.” (R. 110.)

“A. Well, there are two standard tests that are used actually to detect the presence of rickettsial bodies.

Q. You used both of those, did you not?

A. That is right.

Q. And so far as your results of your experiments were concerned, there was no showing that rickettsial bodies, pathogenic and guinea pig, were present in the Dr. Barr's blood?

A. That is right." (R. 125-6.)

The foregoing tests being negative, appellant's counsel then announced he would produce other evidence of the presence of rickettsiae. (R. 119.)

Dr. Moody was then called by appellants as a pathologist. He testified that he attended the autopsy on assured's body and took away certain portions of the body (a portion of the brain, a piece of skin, sections of the heart, liver, lungs, blood vessels, etc.) and later examined and tested them for the presence of rickettsiae. (R. 165.) Dr. Moody then testified on direct examination:

"Q. Did you find certain bodies, Doctor, of significance?

A. Well, I do not know whether they are of any significance or not. I found what I thought was one mass of annucleation bodies in the section of the lungs, but that is the only place.

Q. In the section of lungs?

A. Yes.

Q. What was the appearance of those bodies? Were they in clusters or aggregates?

A. Yes, they were included in a fairly large cell with Gisma strain. They stained green. **There was a whole group of very fine bodies that I was unable to identify.** I made a search to see if I could find any others resembling them, but I could not." (R. 167.)

“Q. Could those bodies which you have described—and it is my recollection that those were the bodies in clusters that strained green under the Gisma stain—have been rickettsial bodies?

A. I really do not know whether they could or could not, but it is my impression that what rickettsial bodies should look like were not like the bodies I saw.” (R. 169.)

On cross-examination Dr. Moody testified:

“Q. In other words, your finding was in effect, Doctor, that this man did not have the blood vessel condition that is common to Rocky Mountain spotted fever?

A. That is right.

Q. Now, you have already testified, I believe, on direct examination that you also found—that you did not find or recognize any rickettsial bodies in Dr. Barr’s—

A. I saw nothing that looked to me like rickettsial bodies.” (R. 188-9.)

Dr. Eaton, director of laboratory research, State Department of Health, had a specimen of assured’s blood and tissue from his body, with which he made certain tests. He testified that he did not see any rickettsia-like bodies (R. 135) and was unable to demonstrate any rickettsial bodies in his examination of the tissues. (R. 138.)

Dr. Eaton then distinguished between rickettsiae and a virus such as produces virus pneumonia from which assured died:

“Q. Now, I understood you to say that a virus is an organism which is not visible under the microscope, is that correct?



A. That is the definition that is generally used.

Q. A rickettsial body, on the other hand, is a bacterium-like body which may be seen microscopically, is it not?

A. Yes." (R. 138.)

Then Doctor Eaton asserted:

"Q. Did you find the pathology and the specimens from Dr. Barr to differ from those specimens which you examine in the ordinary virus pneumonia fatal case?

A. Not essentially, no, in this type of rapidly fatal case.

Q. In other words, from your observation and experiments there was nothing which prompted you to believe that the cause of the pneumonia was rickettsial in nature?

A. No." (R. 138-9.)

Dr. Karl F. Meyer, also called by appellants, testified that he saw certain elementary bodies in the lung cells which could be said to be rickettsiae-like as distinguished from rickettsia (R. 152-154) and when asked if in his opinion these elemental bodies "could have been rickettsiae stated:

"I wouldn't commit myself on that, whether they are rickettsia or elementary bodies. You could not commit yourself on a microscopic examination of sections on embalmed material." (R. 156.)

Dr. Meyer then testified that such elemental bodies could have been those bodies frequently seen in ordi-

nary virus pneumonia cases where there was no suspicion of tick-bite.

“Q. As I understand your conclusion, Doctor, it is that you cannot say that the elementary bodies which you saw were rickettsiae?

A. That is correct.

Q. And you cannot say what else they might have been?

A. That is correct.

Q. It is a fact that they might have been any one of numerous or perhaps we might say innumerable other things?

A. That is correct.

Q. And they might have been any of a number of things which we see in the usual case of virus pneumonia where there is no suspicion or where there is no history of a tick bite?

A. That is correct.” (R. 158.)

Every pathological, serological and laboratory test and study employed by appellants’ experts failed to show any trace of rickettsiae or their lesions; the microscopic examination positively established that the pathology was not that of tick fever but that of virus pneumonia.

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#### 4. THE CLINICAL FINDINGS DID NOT INDICATE SPOTTED FEVER.

At page 20 of appellants’ brief it is said that “The clinical history of the case and the symptoms, such as the rash, the high fever and the cyanosis” show that “the assured was suffering from Rocky Mountain

spotted fever". This is incorrect, the clinical findings are consistent with a virus pneumonia.

Drs. Moody and Marston were the only witnesses who testified as to the clinical manifestations of spotted fever.

Dr. Moody testified that in spotted fever fatal cases the disease is accompanied by a very pronounced enlargement of the spleen so that it would be easily palpable by the common method. (R. 179.) Dr. Moody was present at the autopsy and testified: "I do not believe this spleen was large enough to be felt". (R. 179.)

Dr. Marston testified that in spotted fever cases the spleen is enlarged, tender and palpable and that even clinically you can feel it bulging out; that **such** condition is almost invariable. (R. 236.) He then stated that when the insured was in the hospital he was unable to palpate the spleen and that at the autopsy he noted that the spleen was not enlarged.

Dr. Marston further testified that in spotted fever cases the white blood count runs between 8,000 and 12,000 and higher; that the average is between 8,000 and 12,000. (R. 236.) He then testified that Dr. Barr had a very definite leucopenia, and that his white blood count was only 2,800. (R. 236.) Dr. Marston further testified that the uncontradicted authority is to the effect that the only helpful clinical manifestation of spotted fever is a characteristic rash (R. 235); that death without such rash is a rare and unusual occurrence (R. 236); that before Dr. Barr died he

had looked for a rash or petechial spots and did not find any. (R. 220.) When Dr. Barr was examined by Dr. Briggs just prior to his fatal onset his entire body was carefully examined and Dr. Briggs found that his skin was normal with no evidence of any rash of any kind. (R. 74.)

Thus, the three important clinical manifestations of spotted fever—enlarged and palpable spleen, high white blood count and characteristic rash, were all absent in the case of assured. The clinical manifestations presented were entirely consistent with that of a fatal virus pneumonia.

Dr. Marston testified that the clinical course could be entirely compatible with an influenzal pneumonia. (R. 223.)

He further testified that pains, chills and fever are the usual characteristics of any serious febrile disease (R. 223); serious pains may occur in fatal pneumonia cases (R. 227); that cyanosis is usually encountered in a pneumonia case shortly prior to death (R. 223); and that delirium is generally associated with high fever. (R. 237.)

Dr. Marston's testimony will be discussed at greater length hereafter.

The evidence established that the clinical manifestations during assured's last illness were entirely consistent with a fatal virus pneumonia and inconsistent with spotted fever.

In addition to the foregoing it must be borne in mind that Dr. Marston was the attending physician

who signed the death certificate in which he stated that the cause of death was bronchial pneumonia and did not set forth that Rocky Mountain spotted fever or anything else was a predisposing cause.

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# 5. DR. MARSTON'S OPINION DOES NOT CONSTITUTE EVIDENCE.

Dr. Marston, on direct examination, was asked whether he had any opinion as to what relationship the tick bite bore to the case. His reply, on page 216 of the record, is as follows:

"A. I have felt that due to the history of the tick bite in an area where there have been cases reported of tick bite fever, and due to the abruptness of the onset, the mental confusion, nervousness, extreme pains, incubation period of approximately three or four days—I felt that it was most likely due to tick bite."

On cross-examination the doctor explained the foregoing answer in the following manner:

"Mr. Friedman. Q. Doctor, when did you form the opinion that the tick bite might have caused this death?

A. Well, I suspected it when the history was first given to me, that he had been bitten by a tick; that is one reason why I had called in Doctor Reed. I had never seen a case, and I believe he had seen some, that he knew more about it than I did, so that is why I felt I needed consultation.

Q. I see; so that you had a suspicion of that?

A. Yes, I did.



Q. And that suspicion matured into a definite opinion at the time the man died, or subsequently?

A. Yes, I had had that suspicion right along. My opinion has never been real definite. I felt it was most likely that he died of that. It is possible that he did not. One of the workers over at Berkeley at the Department of Laboratories told me in that neighborhood where he had been hunting there had been cases of Rocky Mountain spotted fever. There also had been cases of plague, and that sort of thing.

Mr. Mackey. If the Court please, I think that should go out as hearsay.

The Witness. I am just telling you why I was suspicious.

Mr. Friedman. Q. I am asking you——

A. And why I felt that that was most likely the cause of his bronchial pneumonia.

Q. But you are not at all certain at this time?

A. No, I am not.

Q. You simply feel that it was more likely to be that than something else?

A. That is right.

Q. That is the sum and substance of your present state of mind, isn't it?

A. Yes." (R. 239-240.)

From the foregoing it will be seen that Mr. Marston had no definite opinion on the ultimate question involved. He did not know what induced the pneumonia causing Dr. Barr's death.

Dr. Marston formed his opinion without knowing anything concerning the assured's pathology. He conceded that a clinical diagnosis of spotted fever must

be abandoned if the pathology of spotted fever was absent. He testified that if there was always proliferation in the terminal vessels in cases of tick bite fever and if there were none found in the examinations and tests made in the instant case that such fact would alter his opinion. (R. 232-3.)

The foregoing opinion of Dr. Marston did not constitute competent evidence. His testimony amounted to no more than a mere speculation as to the possibilities involved in the case. The doctor frankly stated that his opinion was not real definite and that there was a possibility that the assured had died of something other than Rocky Mountain spotted fever. We believe the law relating to a situation of this kind is correctly stated in two California cases as follows:

“When a witness states that he does not know which of two inconsistent things is true it cannot be inferred therefrom that either the one or the other is the fact.”

*Leach v. Board of Dental Examiners*, 87 Cal. App. 207.

“In that connection it should be noted that upon the issues raised by the pleadings, the plaintiff was bound to assume the burden of proof and in the end prevail by a preponderance of the evidence. If the existence of an essential fact upon which a party relies is left in doubt or uncertainty, the party upon whom the burden rests to establish that fact should suffer, and not his adversary. (*Patterson v. San Francisco etc. Ry. Co.*, 147 Cal. 178 (81 Pac. 531).) A judgment cannot be based on guesses or conjectures. (*Puckhaber*

*v. Southern Pac. Co.*, 132 Cal. 363 (64 Pac. 480).) And, also, 'A finding of fact must be an inference drawn from evidence rather than on a mere speculation as to probabilities without evidence. A majority of chances never can suffice alone to establish a proposition of fact, since the slightest real evidence would outweigh all contrary probabilities. (23 Cor. Jur., sec. 1750, p. 18.)'

*Reese v. Smith*, 9 Cal. (2d) 324, 328.

Dr. Marston's entire opinion was based on the assumption, unsupported by any evidence, that the assured had been bitten by an infected tick. **He frankly states that if the history of the tick bite were removed from the history of the case it would be his opinion that Dr. Carr died from some influenzal type of infection.** (R. 223.)

Dr. Marston's opinion rests upon two unwarranted and non-permissible assumptions. He assumes that assured had spotted fever and from this concludes that the assured was bitten by an infected tick or, stated conversely, he assumes that insured was bitten by an infected tick and therefore concludes that he had spotted fever. Neither of these assumptions constitutes competent evidence and the opinion so given is not sufficient to sustain the burden of proof appellants had to carry.

In *National Association of Postal Clerks v. Scott* (CCA-2), 155 Fed. 92, the claim was that Scott had received accidental injuries in 1902 which ultimately resulted in his death. The evidence showed that he

had various internal disorders and diseases. Various hypothetical questions were put to the medical experts whose replies were to the effect that injury may have produced the ensuing chain of circumstances leading to death. In holding this evidence insufficient the Court at page 95 said:

“In the hypothetical questions addressed to the medical experts the plaintiff’s counsel assumes that Scott received an external injury on November 1st severe enough to produce shock which caused all the other ailments which resulted in his death. Indeed, the trial proceeded from beginning to end upon this theory, which would be plausible enough were not the major premises—injury through external, violent and accidental means—wholly lacking.

It is true that he had a bruise on his left shin, but everything else regarding it is left to conjecture. Instead of proving an injury received at Cuba on November 1st severe enough to produce shock, the presence of shock caused by the injury and nephritis and heart disease resulting from shock, the plaintiff’s logic is in the inverse order. The argument proceeds on the following hypotheses—that death on January 25, 1903, was caused by diseases which may have been produced by shock, that shock may be caused by a severe external injury, that a bruise on the skin indicates an external injury, therefore Scott must have received such an injury on November 1st at Cuba. It will be observed that there is a fatal hiatus between the fact that death occurred and the conclusion that it was caused alone by an external injury.



We are of the opinion, therefore, that the court should have directed a verdict for the defendant on the ground that the plaintiff had not sustained the onus of proving that Scott's death was caused alone by external violent and accidental means.

As there was no direct proof of this fundamental fact and as plaintiff's contention regarding it rested only upon presumption and guesswork, it was the duty of the court to direct a verdict for the defendant."

If we may substitute the facts in the instant case for those set forth in the foregoing case, the decision would read something as follows:

It is true that assured was bitten by a tick but everything else regarding it is left to conjecture. There is no evidence that the tick was of the vector species, or, if so, that it was infected. Instead of proving a bite by an infected tick which produced spotted fever which in turned caused a virus pneumonia and then death, appellants' logic is in the reverse order. The argument proceeded on the following hypothesis: that death was caused by a pneumonia which may have been produced by spotted fever; that spotted fever can be caused by a bite of an infected tick; that assured was bitten by a tick, therefore insured must have been bitten by an infected tick. It will be observed that there is a fatal hiatus between the fact that death occurred and the conclusion that it was caused by the bite of an infected tick.

An inference will not establish a fact necessary to a recovery by a plaintiff where the same evidence gives



rise to inferences directly contrary thereto. (*Penn. R. Co. v. Chamberlain*, 288 U. S. 333, 339, 77 L. ed. 819.) The testimony of Dr. Marston falls within this rule. Even though it could be inferred from his testimony that Dr. Barr had spotted fever, which inference his testimony does not warrant, nevertheless his testimony is equally susceptible of the inference that Dr. Barr did not have spotted fever. The record being in this state, plaintiff has failed to carry the burden of proof.

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6. **THERE WAS NO EVIDENCE ESTABLISHING THAT THE ASSURED WAS BITTEN BY A TICK OF THE SPECIES *DERMACENTOR ANDERSONI*, OR THAT SUCH TICK WAS INFECTED.**

The Court will notice that there are many species of ticks; that only certain species are infected and capable of transmitting disease to humans, and of such species all such ticks are not infected or vectors.

Dr. Eaton, medical bacteriologist and a director of the Research Laboratory of the State Department of Public Health, testified that all ticks of the denounced species do not carry rickettsia; that only "a very small percentage of them carry it" (R. 147); that in Lassen County only ten per cent of the denounced species of ticks are vectors. (R. 149.)

Thus, the bite of a tick of the species *Dermacentor andersoni* may be entirely harmless, only about ten per cent of such species being infected. Even if the evidence established that Dr. Barr was bitten by a

tick of this species, this would not establish that such tick was infected.

However, there is no proof that the tick which bit Dr. Barr was of the denounced species.

Louis Nave testified that deer and antelope in Lassen County carry ticks and that the assured killed and dressed an antelope (R. 50-60); that he and Dr. Barr had hunted together in Lassen County for a period of ten years and both he and Dr. Barr had been bitten many times by ticks and, with the exception of the sore produced by the bite, they had suffered no other effects. (R. 91-92.) Nave further testified that two ticks, bearing white spots and resembling ladybugs, fell from his own clothes on the day following the hunt. (R. 79-80.) At the same time Nave saw part of a tick whose head was embedded in the assured's abdomen. This tick was removed by the assured while alone and no one saw it thereafter. (R. 81-84.) Nave gave no description of the tick he saw embedded in the doctor's abdomen.

After the assured died a tick was found in his clothing and passed through the hands of the following named persons: Mr. Ferguson (R. 270), Dr. Moody (R. 160) and Dr. Meyer. The latter testified that he sent this tick to the Department of Entomology of the University of California for identification. (R. 156-158.) Dr. Herms, head of that department, had no recollection of having received the tick. (R. 202-206.) None of these persons described or identified the tick as one of the vector species. There was

no evidence that the tick found in the assured's clothes was the same as the tick Nave saw embedded in the assured's abdomen.

There was no proof establishing that the tick which bit Dr. Barr was one of the denounced species or, if of such species, that it was infected. Appellants' entire case depended upon the proof establishing that Dr. Barr was bitten by an infected tick of the denounced species, that such bite transmitted spotted fever to the assured, which in turn caused a pneumonia from which he died. The major and essential fact which appellants had to establish was that the tick was infected. This basic fact cannot be inferred because the medical facts, if not, as we contend, completely foreclosing such an inference, at least warrant an inference directly to the contrary, viz.: that assured was not bitten by an infected tick.

An inference will not establish a fact necessary to a recovery by plaintiff where the same evidence gives rise to inferences directly contrary thereto.

“We, therefore, have a case belonging to that class of cases where proven facts give equal support to each of two inconsistent inferences; in which event, neither of them being established, judgment, as a matter of law, must go against the party upon whom rests the necessity of sustaining one of these inferences as against the other, before he is entitled to recover. (Citing cases.)

The rule is succinctly stated in *Smith v. First Nat. Bank*, 99 Mass. 605, 611, 612, 97 Am. Dec. 59, quoted in the *Des Moines Nat. Bank Case* (C.C.A. 8th) 145 Fed. 273, *supra*:

‘There being several inferences deducible from the facts which appear, and equally consistent with all those facts, the plaintiff has not maintained the proposition upon which alone he would be entitled to recover. There is strictly no evidence to warrant a jury in finding that the loss was occasioned by negligence and not by theft. When the evidence tends equally to sustain either of two inconsistent propositions, neither of them can be said to have been established by legitimate proof. A verdict in favor of the party bound to maintain one of those propositions against the other is necessarily wrong.’ ”

*Penn. R. Co. v. Chamberlain*, 288 U. S. 333, 339-340, 77 L. ed. 819, 823.

Following the foregoing language the Supreme Court announces another rule fatal to appellants' case, as follows:

“And the desired inference is precluded for the further reason that respondent's right of recovery depends upon the existence of a particular fact which must be inferred from proven facts, and this is not permissible in the face of the positive and otherwise uncontradicted testimony of unimpeached witnesses consistent with the facts actually proved, from which testimony it affirmatively appears that the fact sought to be inferred did not exist.”



## 7. SUMMARY AND CONCLUSION.

The burden of proof was at all times on the appellants to establish by a preponderance of competent evidence that the insured came to his death through accidental means:

*Metropolitan Life v. Broyer* (CCA-9), 12 Fed. (2d) 818;

*U. S. Fidelity Co. v. Blum* (CCA-9), 270 Fed. 946, 952.

Under the facts in the instant case, appellants in order to establish such accidental means had to prove that insured was bitten by an infected tick, that such bite infected insured with spotted fever which in turn was the predisposing cause of the pneumonia from which insured died.

Nowhere in the record is there any evidence establishing the foregoing facts. Whether the tick by which Dr. Barr was bitten was infected is a matter remaining in the realm of conjecture and surmise. The facts are insufficient to give rise to any inference or presumption that such tick was in fact infected. Every expert called by appellants gave evidence which in no manner could be construed as justifying the conclusion that insured had spotted fever. Every test made failed to disclose either the presence of rickettsiae or the effects of rickettsiae. The pathology was not indicative of spotted fever and the clinical manifestations were consistent with a virus pneumonia and inconsistent with spotted fever.



Every premise in the case of appellants is unreliable and uncertain. The circumstances relied on by appellants as making out a *prima facie* case are mere presumptions and assumptions. These circumstances had to be proved and not presumed. The law in this regard has been stated by the Supreme Court as follows:

“These seem to us to be nothing more than conjectures. They are not legitimate inferences, even to establish a fact; much less are they presumptions of law. They are inferences from inferences; presumptions resting on the basis of another presumption. Such a mode of arriving at a conclusion of fact is generally, if not universally, inadmissible. No inference of fact or of law is reliable, drawn from premises which are uncertain. Whenever circumstantial evidence is relied on to prove a fact, the circumstances must be proved, and not themselves presumed. Starkie on Ev., p. 80, lays down this rule thus: ‘In the first place, as the very foundation of indirect evidence is the establishment of one or more facts from which the inference is sought to be made, the law requires that the latter should be established by direct evidence, as if they were the very facts in issue.’ It is upon this principle that courts are daily called upon to exclude evidence as too remote for the consideration of the jury. The law requires an open, visible connection between the principal and evidentiary facts and the deductions from them, and does not permit a decision to be made on remote inferences. Best, Ev., 95. A presumption which the jury is to make is

not a circumstance in proof; and it is not, therefore, a legitimate foundation for a presumption.”

*United States v. Ross*, 2 Otto 281, 23 L. ed. 707,  
708.

The order and judgment of dismissal should be affirmed.

Dated, San Francisco,  
February 19, 1945.

Respectfully submitted,  
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IN THE  
**United States Circuit Court of Appeals**  
For the Ninth Circuit

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WILLIAM H. BARR, a minor, and AGNES  
D. BARR, a minor, by Zeila H. Barr,  
their guardian,

*Appellants,*

VS.

THE TRAVELERS INSURANCE COMPANY,

*Appellee.*

No. 10,728

(CONSOLIDATED  
CASES)

ZEILA BARR,

*Appellant,*

VS.

THE EQUITABLE LIFE ASSURANCE SO-  
CIETY OF THE UNITED STATES,

*Appellee.*

No. 10,729

Upon Appeals from the District Court of the United States for  
the Northern District of California, Southern Division.

**REPLY BRIEF FOR APPELLANTS.**

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**FILED**

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*Appellee.*

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the Northern District of California, Southern Division.

**REPLY BRIEF FOR APPELLANTS.**

---

The appellees in these consolidated causes have filed separate briefs. Each of these is exceptionally well written, and, without being prolix, is a thorough discussion of the issues from the standpoint of the appellees. However, since the brief for the Travelers Insurance Company in No. 10,728, written by Mr. Leo

Friedman, argues each of the two points made in the brief of counsel for the other appellee, and presents some additional contentions, we hope that it will not be deemed a disparagement of the excellent work of counsel for the Equitable Life Assurance Society if we address our reply for the most part to the matters urged in Mr. Friedman's brief. The references hereinafter made, therefore, unless otherwise noted, will be to the brief for the appellee in No. 10,728. This method, we believe, will be more convenient and less repetitious than the answering of each brief separately.

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**THE CASES CITED BY APPELLEES DO NOT SUSTAIN THEIR CONTENTION THAT THE STATE PROCEDURAL LAW HAS NO APPLICATION AND THAT THE RULES PREVAILING IN CALIFORNIA ON MOTIONS FOR A NONSUIT DO NOT APPLY TO CASES REMOVED FROM THE STATE COURTS.**

**ON A MOTION FOR A NONSUIT THE STATE PRACTICE GOVERNS.**

Contending in our opening brief that federal courts follow the state law in cases commenced in or removed to them because of diversity of citizenship, and that it was the duty of the trial judge, in passing upon the motions to dismiss for failure of proof, to follow the law of the State of California as to dismissals or nonsuits for failure of the plaintiff to prove his case, we cited a great number of California cases, which pronounced the well-settled rule that on such motions all the evidence in favor of the plaintiff must be taken as true, and that if the evidence is fairly susceptible



of two constructions, or if either of several inferences may reasonably be drawn from the evidence, the Court must take the view most favorable to the plaintiff. (Opening Brief for Appellants, pp. 34-40.)

Appellees do not question that this is the law in the State of California. It is argued, however, that a different rule prevails on motions to dismiss for failure of proof under Rule 41-b of the Federal Rules of Civil Procedure, and that a proceeding under said rule is not analogous to a motion for a nonsuit in the California Courts.

We submit that this contention is wholly untenable, for the following reasons:

(1) Under the federal statute, and the decisions construing the same, a nonsuit or directed verdict is governed by the state practice.

Section 724, Title 28, *U.S.C.A.*, reads,

“The practice, pleadings, and forms and modes of proceeding in civil causes, other than equity and admiralty causes, in the district courts, shall conform, as near as may be, to the practice, pleadings and forms and modes of proceeding existing at the time in like causes in the courts of record of the state within which such district courts are held, **any rule of court to the contrary notwithstanding.**”

In numerous decisions, the federal Courts have held that, under this section, dismissal or nonsuit on motion of the defendant without the consent of the plaintiff, after the introduction of evidence, and the

effect thereof as a judgment on the merits, are governed by the state practice.

*Central Transportation Company v. Pullman's Palace Car Co.*, 139 U.S. 24, 11 S.Ct. 478, 35 L. ed. 55;

*Slocum v. N. Y. Life Ins. Co.*, 228 U.S. 364, 57 L. ed. 879, 33 S.Ct. 523;

*Neil Bros. Grain Co. v. Hartford Fire Ins. Co.* (C.C.A. 9), 1 Fed. (2d) 904;

*Antocic v. Baltimore & Ohio R.R. Co.*, 47 Fed. (2d) 97;

*Falvey v. Coats*, 47 Fed. (2d) 856, 89 A.L.R. 1;

*Bohenik v. Delaware & H. Co.*, 49 Fed. (2d) 722;

*Clarke v. Order of United Commercial Travelers*, 79 Fed. (2d) 564.

And a federal Court has no power to withdraw the case from the jury and enter judgment for the defendant "on the merits."

*Neil Bros. Grain Co. v. Hartford Fire Ins. Co.*, supra;

*F. W. Woolworth Co. v. Davis*, 41 Fed. (2d) 342;

*Blass v. Virgin Pine Lumber Co.*, 50 Fed. (2d) 29;

*Ristucci v. Norfolk & W. R. Co.*, 60 Fed. (2d) 28.

The California Courts hold that the right of the Court to direct a verdict is governed by exactly the same principles as apply to a motion for a nonsuit.

*Duggan v. Forderer*, 79 Cal. App. 339, 249 Pac. 533;

*Estate of Flood*, 217 Cal. 763, 21 P. (2d) 579.

The rule in the State Courts as to the direction of a verdict applies in the Federal Courts.

*Kennedy Lumber Co. v. Rickborn*, 40 Fed. (2d) 228;

*Colon v. Clyde S.S. Co.*, 52 Fed. (2d) 845;

*Clarke v. Order of Com. Travelers*, *supra*.

In *Central Transportation Co. v. Pullman's Palace Car Co.*, *supra*, the Supreme Court of the United States says:

“The difference between a motion to order a nonsuit of the plaintiff and a motion to direct a verdict for the defendant, is, as observed by Mr. Justice Field, delivering a recent opinion of this court, ‘rather a matter of form than of substance, except that in the case of a nonsuit a new action may be brought, whereas in the case of a verdict the action is ended unless a new trial be granted, either upon motion or upon appeal.’ (*Oscanyan v. Winchester Repeating Arms Co.*, 103 U.S. 261, 264, 26 L. ed. 539, 541.)

Whether a defendant in an action at law may present in the one form or in the other or by demurrer to the evidence, the defense that the plaintiff, upon his own case, shows no cause of action, is a question of ‘practice, pleadings and forms and modes of proceeding,’ as to which the courts of the United States are now required by

the act of Congress of June 1, 1872, Chapter 255, to conform as near as may be to those existing in the courts of the state within which the trial is had."

In *Neil Bros. Grain Co. v. Hartford Fire Ins. Co.*, supra, Judge Rudkin of this Court quotes a Washington statute, identical with that of the statute of California (sec. 408, I *Rem. Comp. Stat.*), which read:

"An action may be dismissed or a judgment of nonsuit entered. \* \* \* By the court, upon motion of the defendant when, upon the trial, plaintiff fails to prove a sufficient case for the jury."

Citing *Slocum v. N. Y. Life Ins. Co.*, supra; *Central Transportation Co. v. Pullman's Palace Car Co.*, supra, and *Coughran v. Bigelow*, 164 U.S. 301, 17 S. Ct. 117, 41 L. ed. 442, he proceeds:

"This section establishes a practice or mode of procedure which the federal courts are required to follow under the Conformity Act."

Counsel for the appellees apparently have overlooked the Conformity Act and the foregoing decisions when they argue that the trial court was not bound to follow the California procedure and the rules and principles laid down by the California courts as to motions for a nonsuit or a directed verdict.

In *Slocum v. New York Life Insurance Co.*, supra, it is clearly held that a federal court has no power to withdraw the case from the jury and enter judgment on the merits in favor of the defendants.

*Young v. U. S.*, 11 Fed. (2d) 823, and *Gary Theatre Co. v. Columbia Pictures Corp.*, 120 Fed. (2d) 891, are cited by appellees in support of their statement that "A judgment of dismissal under rule 41(b) is to be affirmed on conflicting evidence when there is any substantial evidence to support findings in favor of defendants."

In *Young v. United States*, supra, the trial Court at the close of plaintiff's evidence granted a motion of the defendant "for a dismissal on the ground that the plaintiff had not produced sufficient evidence to show that 'he was suffering from pulmonary tuberculosis, active, or from any other disability which would make it impossible for him to engage in some gainful occupation.' "

The Court made a minute order reciting that the case had been heard on the merits and ordering judgment in favor of the defendant. The plaintiff thereafter moved the Court to vacate this order and the Court amended the order to read, "That the motion made by the defendant to dismiss plaintiff's complaint on the ground that the plaintiff had failed to make a prima facie case is sustained. The Court thereafter made findings of fact and conclusions of law and entered judgment in favor of the appellee. This Court, in an opinion by Judge Wilbur, uses the following language:

"In presenting his appeal appellant stated that one question on appeal is whether or not there is substantial evidence to show that plaintiff became permanently and totally disabled on or before



September 20, 1929. He thus assumes one of the questions to be determined on appeal is whether or not there is sufficient evidence to require the submission of the case to a jury, had there been a jury. The appellant is in error in that regard for the judgment of the court was on the merits. The rules so provide. Rule 52(a) of the Federal Rules of Procedure, 28 U.S.C.A. following section 723c, requires that there shall be findings of fact and conclusions of law 'in all actions tried upon the facts without a jury'. Rule 41(b) provides for an involuntary dismissal of an action after plaintiff has completed the presentation of his evidence and defendant has moved for dismissal upon the ground that upon the facts and the law plaintiff has shown no right to relief. It is further provided that 'unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this rule, other than a dismissal for lack of jurisdiction or for improper venue, operates as an adjudication upon the merits.'

"These rules do away with the former distinction in California applicable in the federal courts sitting in California between a judgment of nonsuit and a judgment on the merits in all suits or actions where the court sits without a jury.

"In the case at bar from the two minute orders and the findings of fact and conclusions of law and judgment, it is clearly apparent that the court was of the opinion and decided that the appellant had not made out a prima facie case."

It is therefore apparent that all that the *Young* case really decides is that the judgment of the District

Court was proper because of the failure of the plaintiff to prove a *prima facie* case. This is so because, after using the language just quoted, the Court proceeds to review the evidence and to point out that the defendant actually had engaged in gainful occupations. To state the matter otherwise, an order granting a nonsuit would have been proper under the state practice. It is true that the Court at the conclusion of the opinion says:

“Even if we assume that there was sufficient evidence to justify a finding in favor of the appellant, it can not be said that the finding in favor of the government was clearly erroneous where during a long period of time and at the very time when the policy expired the plaintiff was actually making a living by a gainful occupation and had done so for a number of years before that time, where it was not clearly established that this work imperiled his health or life.”

This statement, together with that contained in the last paragraph heretofore quoted from the opinion, are clearly *obiter dicta* and not necessary to the decision. In any event, we submit that if *Young v. U. S.*, supra, is authority for the proposition that a federal Court, sitting in California, may, on a motion for a dismissal for failure of proof, weigh the evidence and find upon the facts, contrary to the state practice, it is to that extent erroneous and should be overruled or disapproved.

*Gary Theatre Co. v. Columbia Pictures Corp.*, supra, was a suit in equity to enjoin the defendants'

practice in distributing motion picture films, charging violation of the Sherman Anti-trust Act. At the conclusion of the plaintiff's case, the Court, sustaining defendants' motion, entered judgment dismissing the complaint for want of equity. The trial Court entered special findings of fact as contemplated by Rule 52(a) of the Federal Rules of Civil Procedure. The Circuit Court of Appeals held that the evidence warranted the findings, and concludes by saying:

“To determine the question in favor of plaintiff would necessitate the substitution of our judgment upon the facts for that of the trial court.”

The case is easily distinguishable from the case at bar for the reasons, first that it was a proceeding in equity, and, second, that the Court made specific findings of fact, **which was not done in the case at bar.**

Moreover, the Court adverts to the well-settled rule that where one of two inferences may with equal propriety be drawn from the evidence, the plaintiff has failed to sustain the burden of proof. Unfortunately, the Court in its statement of this rule does not place upon it the limitation to which it is subject. Ordinarily on a motion for a nonsuit or a directed verdict, if the evidence is reasonably susceptible of two inferences, it is for the jury or for the Court sitting without a jury to say which of the two inferences shall prevail, and for the purposes of the motion every inference must be resolved favorably to the plaintiff (see cases cited in Opening Brief for Appellants, pp. 34-40). It is only where the evidence

and the effect thereof leave no possible room for difference of opinion in the minds of reasonable persons that the Court can say as a matter of law that it is insufficient to justify a verdict for the plaintiff. If the trial Court is of the opinion that a verdict for the plaintiff would be **against the weight of the evidence**, he may, after verdict, grant a new trial. Indeed, it is his duty to do so. But he may not grant a nonsuit or direct a verdict in favor of the defendant. These principles are so well settled in California that it would be an impeachment of the legal learning of this Court to cite further authorities in their support.

However, in actions where fraud is alleged,—and the gist of the action in *Gary Theatre Co. v. Columbia Pictures Corp.*, supra, was founded upon alleged fraudulent practice in violation of the anti-trust laws,—the courts have adopted a rule that is *sui generis*. In such cases it has been held that “if there be two inferences equally reasonable and equally susceptible of being drawn from the proved facts, the one favoring fair dealing and the other favoring corrupt practice, it is the express duty of the court or jury to draw the inference favorable to fair dealing.” (*Ryder v. Bamberger*, 172 Cal. 791, 799; *Raine v. Spreckels*, 54 Cal. App. (2d) 169, 173; *Estate of Bryson*, 191 Cal. 521, 540.) Accordingly, the decision of the Circuit Court of Appeals in *Gary Theatre Co. v. Columbia Pictures Corp.*, supra, was fully justified, because there were two conflicting inferences which might with equal propriety have been drawn from the evidence, and, therefore, the presumptions that the law has been



obeyed and of innocence of criminality, fraud or unfair dealing, came of necessity to the aid of the defendant, and the *prima facie* evidence of fraud which the law requires was not made out.

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**THE TRIAL JUDGE TREATED THE MOTION AS A MOTION FOR A NONSUIT AND MADE NO FINDINGS OF FACT.**

It is well to state in passing that it is obvious that the learned trial judge in the case at bar did not attempt to rule upon the weight of the evidence or the credibility of the witnesses, but merely took the position that, taking all of the evidence for the plaintiffs as true, the plaintiffs failed to make a *prima facie* case.

The trial judge made no findings of fact, as was done in *Young v. United States*, supra.

That we have not misconstrued the attitude of the trial judge is apparent from what was stated by him in granting the motion. At page 273 of the transcript on appeal, in No. 10,728, the learned trial judge says:

“Gentlemen, if there were a **scintilla of evidence** in this matter, speaking colloquially of the rule that we used to learn about, I would favor the cause of the plaintiff here, because, after all, he paid for the insurance policy and should get the benefit of it. But despite my inclination in the matter and my opinions about it, after all, we have to be guided by the rules of law, and there is a burden of proof, Mr. Taaffe, that the plaintiff has to sustain. You have to have **some evidence** upon which the Court can find that there is a liability, or, at least, a *prima facie* case.”



It is clear, therefore, that the trial judge took the position that there was not a scintilla of evidence to justify a finding for the appellants. That he treated the motion to dismiss as a motion for nonsuit is apparent, not only from this statement, but from the fact that he made no findings, as was done in *Young v. United States*, supra, and *Gary Theatre Co. v. Columbia Pictures Corp.*, supra.

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**SECTION 41(b) OF THE FEDERAL RULES OF PROCEDURE DOES NOT CONFER UPON A TRIAL JUDGE THE RIGHT TO PASS UPON THE EVIDENCE ON A MOTION FOR A DISMISSAL.**

This must be true for three reasons:

1. Subdivision (b) of Section 41 does not by its terms apply only to cases tried by the Court without a jury. It obviously applies to all trials.

2. If the rule is given the construction contended for by learned counsel for the appellees, its inevitable result will be to confer upon every trial judge the power to take every cause from the jury, if, in his opinion, the evidence does not sustain a verdict for the plaintiff. He may substitute his own opinion of the evidence for that of the jury impaneled and sworn to try the cause, thus making the impanelment of a jury a mere hollow form. Under the plain provisions of the Constitution, this can not be done, First, because by the Seventh Amendment to the Constitution the right of trial by jury as at common law is preserved inviolate; Second, because by the provisions of Sec-

tion 723c, Title 18, U.S.C.A., by which alone the Supreme Court of the United States was empowered to make the rules of federal procedure, "the right of trial by jury as at common law and declared by the Seventh Amendment to the Canstitution shall be preserved to the parties inviolate."

3. It is submitted that Section 723c, U.S.C.A., does not repeal and was not intended to repeal Section 724 of Title 28, and was not intended to give to the Supreme Court the power by the adoption of rules to repeal existing statutes. Implied repeals are not favored by the courts. The courts are slow to hold that one statute has repealed another by implication, and they will not make such an adjudication if they can avoid doing so consistently or on any reasonable hypothesis. The general policy of the law is adverse to repeal of statutes by implication. This doctrine has been enunciated so often that mere citation of the cases in which it has been expounded would, without quotation, occupy many pages.

59 *Corpus Juris* 905, and eight columns of decisions cited in the footnotes.

Moreover, if Section 723c U.S.C.A. confers upon the Supreme Court the power by the adoption of rules of procedure, to amend or repeal existing laws, the said statute is unconstitutional as a delegation of legislative power to the judicial branch of the government.

The legislature can not delegate or confer legislative power on the courts or impose legislative duties

upon them, because such duties are not judicial in nature. The power of courts to make such rules as they deem necessary is subject to the limitation that such rules must not contravene a statute or the organic law.

*Johnson v. Manhattan Ry. Co.*, 289 U. S. 479,  
53 S. Ct. 721, 77 L. ed. 1331;

*In re Hein*, 166 U. S. 432, 17 S. Ct. 624, 41 L.  
ed. 1066;

*Washington-Southern Navigation Co. v. Balti-  
more & P. S. B. Co.*, 263 U. S. 629, 44 S. Ct.  
220, 68 L. ed. 480.

As against conflicting statutory provisions, such rules are without force.

*General Electric v. Marvel Rare Metals Co.*,  
287 U. S. 430, 53 S. Ct. 202, 77 L. ed. 498.

They must be subordinate to the law, and, in case of conflict, the law will prevail.

*Ewing v. United States*, 244 U. S. 1, 37 S. Ct.  
494, 61 L. ed. 955;

*Federal Land Bank v. Crombie*, 259 Ky. 389,  
80 S. W. (2d) 39.

This is fundamentally true when the conflict is with the organic law, or with a substantial right at common law, or under a statute; and it is ordinarily held to be true when the conflict is with a statute regulating procedure.

*Alaska Packers Assn. v. Pillsbury*, 301 U. S.  
174, 57 S. Ct. 682, 81 L. ed. 988;

*Johnson v. Manhattan Ry. Co.*, *supra*;

*Davidson Bros. Marble Co. v. United States*,  
213 U. S. 10, 29 S. Ct. 324, 53 L. ed. 675;

*Ward v. Chamberlain*, 2 Black 430, 17 L. ed. 319.

This limitation also applies when the rule-making power is exercised under statutory authority.

*Concord Casualty & S. Co. v. United States*,  
69 Fed. (2d) 78;

*Ward v. Chamberlain*, *supra*;

*People v. Metropolitan Surety Co.*, 164 Cal.  
174, 128 Pac. 324.

It is obvious that the rule in question deals, not with a mere matter of procedure, but with rules of evidence and the effect thereof, and that therefore its validity can not be sustained, because a rule of court can not interfere with or control the rules of evidence.

*Mills v. Bank of United States*, 11 Wheaton 431,  
6 L. ed. 512;

*Doe v. Winn*, 5 Peters 233, 8 L. ed. 108;

*Roberts v. White*, 32 R. I. 185, 78 Atl. 497.

We submit, therefore, that, if Rule 41(b) bears the construction given it by *Young v. U. S.*, *supra*, it is invalid, because it attempts to repeal or abrogate the conformity act passed by Congress for the purpose of preserving the rights of citizens of the state in the federal tribunals which function within their territorial limits.

Lastly, we submit that, even if this Court should feel impelled to follow *Young v. United States*, *supra*, nevertheless the judgment must be reversed for the

failure of the District Court to make findings as required by Rule 52(a) of the Federal Rules of Procedure.

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**UNDER THE EVIDENCE PLAINTIFFS WERE ENTITLED TO  
A JUDGMENT IN EACH CASE.**

This contention was fully discussed with copious excerpts from the testimony, and with citation of many authorities, in the Opening Brief for Appellants, pages 6-32 and 41-57.

Counsel have summarized their argument as to the alleged insufficiency of the evidence in the following language:

“Under the facts in the instant case, appellants. in order to establish such accidental means, had to prove that the insured was bitten by an infected tick, that such bite infected insured with spotted fever, which in turn was the predisposing cause of the pneumonia from which the insured died.”

(Brief for Appellee The Travelers Insurance Co., p. 26.)

In other words, according to learned counsel, it would have been necessary to have produced a witness who saw the tick bite the deceased, to have captured what counsel with sarcasm not entirely commendable in a case of this character refers to as “the guilty tick,” to have had a bacteriological examination made of the tick, and to have seen the process of an infection going on in the body of the deceased before his fatal illness



developed. There are two conclusive answers to this somewhat naive argument: first, that an examination of the tick would have revealed nothing, because the tick, which is a vector or carrier of the infection, is not itself infected, any more than a typhoid-carrier is suffering from typhoid fever; and, second, that to observe the process of incubation taking place in the bloodstream of the deceased while he was still alive would have been an impossibility. Counsel are loud in their wail that a post-mortem examination of certain specimens of the lung tissue did not positively reveal the existence of **rickettsia**. This is a matter of no moment, because the testimony given by the medical gentlemen quoted in the opening brief shows that at the time the examinations were made the body had been embalmed, and that, moreover, a person may die of Rocky Mountain Spotted Fever and **rickettsia** be absent, where the onset of the disease is so sudden as in the case at bar.

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#### CONCLUSION.

We repeat that no reasonable conclusion could be drawn from the evidence other than that the deceased came to his death from a violent and accidental cause; to-wit: the bite of a tick which produced Rocky Mountain Spotted Fever resulting in pneumonia, which was the terminal cause of death; indeed, no other possible cause of death was suggested by learned counsel, either in their cross-examination of witnesses at the trial, or in their briefs. The situation

presented is that of a man of robust physique and in the best of health. He went on a hunting trip and was bitten by a tick of a species which is a notorious vector of Rocky Mountain Spotted Fever; a checkup by a physician on the day following his return showed him to be in the best of health; the next day he complained of illness and went supperless to bed; the following morning he developed a violent fever, talked incoherently, and that night lapsed into unconsciousness. The next day he was dead, in spite of all that medical science could do for him. His symptoms were those of Rocky Mountain Spotted Fever, and there is not even a "scintilla" of evidence that his death was produced by anything else than the tick bite. Courts have upheld recovery for death from accidental causes on far weaker evidence. See

*Omberg v. United States Mutual Accident Assn.*, 101 Ky. 303, 40 S. W. 909;

*McAuley v. Casualty Co. of America*, 39 Mont. 185, 102 P. 586;

*North Wildwood v. Cirelli*, 29 N. J. L. 302,

and other cases cited in appellant's opening brief, notably the case of

*Reinoehl v. Hamacher Pole and Lumber Co.*  
(Idaho), 6 Pac. (2d) 806,

in which the facts are indistinguishable from those in the case at bar.

These consolidated cases present another instance of the all-to-common practice of insurance companies "welshing" on the payment of policies for which they

have accepted premiums, often over a long period of years.

It is submitted that on the proven facts, if no other evidence had been taken, it would have been the duty of the trial Court to have found for the plaintiff, because the rule is well settled, that uncontradicted and unimpeached testimony can not be arbitrarily disregarded. See the elaborate discussion of this subject by Justice Sutherland of the Supreme Court of the United States in

*Chesapeake & Ohio R.R. v. Martin*, 518 S. Ct. 453, 283 U. S. 209, 75 L. ed. 983.

For these reasons, it is respectfully submitted that the judgment of the lower Court should be reversed, and the cause remanded to the District Court for a new trial.

Dated, San Francisco,  
March 19, 1945.

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